

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY  
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STATE OF WISCONSIN,

Plaintiff, JURY TRIAL  
-vs- Case No. 04CF000609

DANNY L. WILBER,

Defendant.

COPY

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CHARGE: First Degree Intentional Homicide While  
Armed with a Dangerous Weapon

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February 17, 2005  
Milwaukee, Wisconsin  
Safety Building-Room 316

BEFORE:

THE HONORABLE MARY M. KUHNMUENCH  
CIRCUIT JUDGE

APPEARANCES:

JAMES GRIFFIN, Assistant District Attorney,  
Appeared on behalf of the State of Wisconsin.

MICHAEL CHERNIN, Attorney-at-Law,  
Appeared on behalf of the defendant.

Defendant appeared in person.

Lori J. Cunico  
Official Court Reporter

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TRANSCRIPT OF PROCEEDINGS:

THE COURT: State of Wisconsin v.  
Danny Wilber, 04CF000609, first degree  
intentional homicide while armed with a  
dangerous weapon. Appearances please.

ATTORNEY GRIFFIN: Assistant DA  
Jim Griffin for the State along with Detective  
Tom Casper with the Milwaukee Police  
Department.

ATTORNEY CHERNIN: And Michael  
Chernin appearing on behalf of Danny Wilber,  
who appears in person.

THE COURT: Good morning.  
Mr. Jennings, I'm going to remind you that you  
remain under oath. When the jury comes in you  
must stand with the rest of the people in the  
court. Bring the jury in.

(Jury in box.)

THE COURT: Please be seated.  
Welcome back, ladies and gentlemen. I  
probably lost all credibility with you since  
we're now an hour and five minutes after, but  
I'm still the judge. All right. We are going  
to continue -- you may be seated  
Mr. Jennings -- with the direct examination of

1           this witness.   Mr. Griffin.

2                               CONTINUED DIRECT EXAMINATION OF

3           DONALD JENNINGS:

4   BY ATTORNEY GRIFFIN:

5   Q.   Mr. Jennings, on March 14th, I don't know if  
6        you remember the specific day, but the day  
7        that the police talked to you about all of  
8        this, you remember being downtown here with  
9        the police?

10  A.   Yes, I do.

11  Q.   How was it that you came to be in the police  
12       station talking to them over there at the  
13       Detective Bureau?

14  A.   'Cuz --

15                           ATTORNEY CHERNIN:   I'm going to  
16       object.

17                           THE COURT:   Basis?   Side bar with  
18       the lawyers.

19                           ATTORNEY CHERNIN:   Yeah.

20                           (Side bar.)

21                           THE COURT:   Back on the record.

22       You may ask the question.

23  BY ATTORNEY GRIFFIN:

24  Q.   How was it that you came down to the police  
25       station on -- when they talked to you about

1           this?

2     A.   'Cuz I was -- I was at a -- a weekend  
3           nightclub, and when I was walking through the  
4           hallways I guess, one of the officers had my  
5           picture in his wallet, I guess, he searching  
6           around like -- like I did it.

7     Q.   Did you know that your cousin Danny Wilber had  
8           been arrested on February 20th?

9     A.   Yeah, to my knowledge.

10    Q.   Right?

11    A.   Correct.

12    Q.   And you knew even before that, after Antonia  
13           West had been talked to by the police and  
14           that, that the police thought Danny Wilber was  
15           the guy that shot and killed Mr. Diaz there in  
16           that after hours; right?

17                   ATTORNEY CHERNIN:  Objection.

18           Leading, and 906.02, lack of personal  
19           knowledge.

20                   THE COURT:  Sustained.

21           Rephrase.

22    BY ATTORNEY GRIFFIN:

23    Q.   When did you find out that the police thought  
24           Danny Wilber killed Mr. Diaz?

25    A.   I didn't find out till he was in custody.

1 Q. On the 20th?

2 A. Yes.

3 Q. Did you talk to Antonia West any time  
4 between -- that you can recall between the  
5 time of the shooting and the time Mr. Wilber  
6 was arrested?

7 A. Yeah, I talked to her, but it was -- it wasn't  
8 specific about who did it or who didn't do  
9 it. It was, did you see that, did you  
10 understand that, that's what was the whole  
11 question, about the whole situation was.

12 Q. Did she tell you that she'd been questioned by  
13 the police about this?

14 ATTORNEY CHERNIN: Objection.

15 A. Yes, she did.

16 ATTORNEY CHERNIN: Hearsay.

17 THE COURT: Overruled. I'll  
18 allow it.

19 A. Yes, she did.

20 THE COURT: It's not asking what  
21 the conversation was about, just what was  
22 asked. I'll allow the question.

23 What is your response?

24 THE WITNESS: Yes, she did.

25 THE COURT: You may continue.

1 BY ATTORNEY GRIFFIN:

2 Q. And did she tell you that the police kept  
3 telling her that they wanted her to say Danny  
4 did it, Danny did it?

5 ATTORNEY CHERNIN: Objection.  
6 Hearsay.

7 THE COURT: Overruled. I'll  
8 allow it.

9 A. No, she didn't at first.

10 BY ATTORNEY GRIFFIN:

11 Q. At first?

12 A. Correct.

13 Q. When did you find out that the police were  
14 telling her something like that?

15 A. She --

16 ATTORNEY CHERNIN: Objection.  
17 This calls for hearsay again.

18 A. She said police --

19 THE COURT: One moment. I'll  
20 note your running objection. You may  
21 continue.

22 A. Well, she -- she brung it to my attention but  
23 she didn't tell me what was going on, how it  
24 was going to happen. She just told me that  
25 they was trying to badger the witness to get

1 her to try to testify against her own brother.

2 BY ATTORNEY GRIFFIN:

3 Q. So it was before Mr. Wilber was arrested that

4 in your mind you knew that the police, because

5 they're the police, had decided that they were

6 looking at Danny as the guy?

7 A. Yes.

8 Q. And was it that the point, sir, that you

9 called the police and told them, you got the

10 wrong guy? You guys are look at Danny Wilber,

11 I was there, I saw as soon as that shot went

12 off his hands went up in the air, he had no

13 gun?

14 A. Correct.

15 Q. You went right to the police station?

16 A. When they arrested me I -- I -- I stated

17 that --

18 Q. No, no --

19 A. -- the whole time.

20 Q. -- the day before they arrested you or the day

21 before that or the day before that or the day

22 before that?

23 A. I didn't even see no one.

24 Q. You didn't even see no one?

25 A. No, I didn't, but Antonia, 'cuz that's my



1 family.

2 Q. Well, did you tell the police, sir, at one  
3 point when you talked to them, you were going  
4 to do what you can to protect your family and  
5 defend your cousin?

6 A. Correct.

7 Q. So what were you waiting for?

8 A. What you mean, what I was waiting for?

9 Q. When Mr. Wilber got arrested on the 20th did  
10 you call the police or go to the police  
11 station and say, you have the wrong man?

12 ATTORNEY CHERNIN: Objection. It  
13 assumes a fact not in evidence.

14 THE COURT: Overruled. I'll  
15 allow it.

16 A. Ask that again.

17 BY ATTORNEY GRIFFIN:

18 Q. When they -- the police arrested your cousin  
19 Danny did you go to the police or call the  
20 police and say, you've got the wrong man, I  
21 saw him, I saw his hands go up in the air  
22 immediately after the shot?

23 A. No, I didn't.

24 Q. How about the day after that?

25 A. No, I didn't.

1 Q. The day after that?

2 A. 'Cuz I had a warrant for my arrest at the time  
3 for driving, and I didn't want to be sitting  
4 in no jail cell just to testify. And I  
5 didn't -- I didn't want to do that.

6 Q. So when were you planning on protecting your  
7 family and defending your cousin with that  
8 outstanding warrant? A little bit later,  
9 maybe in the summertime you'd turn yourself in  
10 or what?

11 A. Well, I waited, I waited at home, or whenever  
12 they caught me that's when they caught me.

13 Q. They didn't catch you at home?

14 A. No, they caught me at the club.

15 Q. So my question is, sir, do you know, according  
16 to you, your cousin is wrongly accused of  
17 this, you were there when that shot went off  
18 and you looked, his hands immediately went up  
19 in the air, who better than you to tell the  
20 world that Danny Wilber didn't shoot and kill  
21 that guy than you? Who better?

22 A. 'Cuz I heard what was going on and at the  
23 time, after the shot, it was a reaction of you  
24 gonna -- you gonna automatically look towards  
25 wherever the shot came from, and that's when

1           you looked and you see the man just fall, and  
2           everybody just run out the house.

3    Q.    When were you going to tell the police all  
4           that, that your cousin Danny didn't kill --

5    A.    I was scared and I was petrified and I didn't  
6           want nobody to get blamed for nothing, so I  
7           just kept my mouth shut till they caught me.  
8           And that's when I gave them my statement, what  
9           you got in front of you.

10   Q.    Right. But for 24 days at least you know that  
11          Mr. Wilber's been arrested for this?

12   A.    Correct.

13   Q.    So why didn't you go clear it up with the  
14          police? Driving warrant versus homicide, and  
15          you thought your driving warrant was more  
16          important? You're tight with your cousin?

17   A.    Of course. I know he didn't do it, so it  
18          wasn't even no -- no -- I ain't never have to  
19          prove it, I was going to wait till court.

20   Q.    You were going to wait till court?

21   A.    I was going to wait till the court. Now I'm  
22          here.

23   Q.    And then turn yourself in on the warrant?

24   A.    No, they caught me, I said I was going to wait  
25          till they catch me, and they caught me at the

1           nightclub and now I'm here.

2   Q.   So let me get this straight.  If, for example,

3           on March 1st of last year, God forbid you'd

4           been in an auto accident and died, your story

5           about Danny Wilber being innocent, about Danny

6           Wilber throwing his hands up, about no way

7           Danny Wilber could have shot that guy, that

8           would have gone to you with your grave and no

9           one would have known?

10  A.   Not correct.

11  Q.   Who would have known?

12  A.   The court.

13  Q.   How?

14  A.   'Cuz I -- they arrested me to testify.

15  Q.   No, I'm saying if a week before they arrested

16           you.

17  A.   A week before I was trying to stay away so I

18           ain't gotta testify, 'cuz I didn't want to be

19           standing up here on that stand and testify --

20  Q.   Why?

21  A.   -- which I'm doing now.

22  Q.   Why wouldn't you want to do that?

23  A.   Because I'm okay with it now, because it's

24           coming out more clear to me that I know he

25           didn't do it.

1 Q. It's coming more clear right now?

2 A. Yes, it is.

3 Q. And what about on March 1st, two weeks before

4 the police arrested you, last year March 1st,

5 do you remember that time before the police

6 arrested you after the killing, before the

7 police arrest you, Danny Wilber gets arrested;

8 right?

9 A. Correct.

10 Q. Okay. If God forbid you'd had a heart attack

11 and died the day after he was arrested, how

12 would the world have known that you saw him

13 throw his hands up and that he had no gun and

14 all of those things? How would anyone have

15 known?

16 A. Because I wasn't the only witness in the

17 kitchen.

18 Q. Right. Your cousin Antonia was there; right?

19 A. Like the sixth witness that was in the

20 kitchen.

21 Q. What about Antonia, is she one of them?

22 A. Yeah, she's a witness.

23 Q. The one who you told to shut the fuck up when

24 she was talking about what she'd seen?

25 A. Correct.

1 Q. I'm going to show you what's been marked as  
2 Exhibit 38. Do you recognize that?  
3 A. Somewhat. It's kind of big though, but --  
4 Q. It's kind of big?  
5 A. Yeah, the way it spreaded out.  
6 Q. Pick it up and look at it.  
7 A. I'm looking at it.  
8 Q. It's a diagram, not to scale, but kind of a  
9 loose sketch of that place where the shooting  
10 took place; right?  
11 A. Correct.  
12 Q. And there's initials on there, like AW for  
13 Antonia West, and DW for Danny Wilber, and an  
14 X for unknown Hispanic male, what is all that?  
15 A. Them was all the witnesses that was in the  
16 kitchen.  
17 Q. Is this you telling the police where everyone  
18 was, as best you recalled?  
19 A. When they arrested me they already had this  
20 sketch.  
21 Q. Right, but I'm talking about where the  
22 initials are put in, like right by the sink,  
23 do you see where it says sink here, just to  
24 the left of that there's the initials DJ?  
25 A. Correct.

1 Q. Is that where you were?

2 A. Yes, I was.

3 Q. And then just next to that is -- a little bit

4 up to the left are the initials RT. That's

5 for Richard Torres; correct?

6 A. Correct.

7 Q. And then right by the corner of the table here

8 are the initials ON for Oscar Niles; right?

9 A. That wasn't his spot though, but that's

10 correct, the initials.

11 Q. And then over to the right here are AW and DW

12 in black?

13 A. Correct.

14 Q. Now, I want to go right over by where it says

15 side porch over here; right? See this area

16 here?

17 A. Yep.

18 Q. Now, there's three sets of initials there, but

19 two of them are in red; correct?

20 A. Yep.

21 Q. Which two are in red?

22 A. DW and DD.

23 Q. DW and DD is; that right?

24 A. Correct.

25 Q. And that stands -- the DW stands for Danny

1 Wilber the defendant, and DD stands for David  
2 Diaz, the guy that got shot; correct?

3 A. Nope.

4 Q. What does it stand for?

5 A. I know what it stands for, I'm just saying the  
6 penmanship where the spots are, that's  
7 incorrect.

8 Q. I want to talk about what you were telling the  
9 police when you talked to them. You see here  
10 where it says DD in red, David Diaz after  
11 shooting, and you have the DD right there?

12 A. Yep.

13 Q. Okay. And right above that is DW, also in  
14 red, which you marked as Danny Wilber during  
15 shooting; correct? That's what you were  
16 telling the police?

17 A. Let me get this correct.

18 Q. Sure.

19 A. These are all in the wrong spot. First of  
20 all, these are all in the wrong spot. He  
21 wasn't standing right there, he was standing  
22 in front of Antonia, which is not over here by  
23 the door yet until he grabbed and try to grab  
24 and he hit his hand, that's when all the  
25 conversation started. That's when everybody



1           rushed into the kitchen.

2   Q.   Let me ask you this.  What -- when you were  
3           with the police, what were you telling them  
4           that had them put these initials DW and DD  
5           right next to each other there in red?

6                    ATTORNEY CHERNIN:  Well --

7   A.   I don't understand that --

8                    ATTORNEY CHERNIN:  -- on the  
9           basis.

10  A.   -- 'cuz they weren't red.

11                   THE COURT:  One moment.

12                   ATTORNEY CHERNIN:  Objection on  
13           the basis foundation.  How would he know  
14           what's in the police's mind?

15                   THE COURT:  That's not what is  
16           being asked.  I'm going to overrule the  
17           objection.  Reask the question.  And,  
18           Mr. Jennings, I'm going to direct you to  
19           respond to the question that's put to you.

20                   Mr. Griffin, you may ask the  
21           question again.

22  BY ATTORNEY GRIFFIN:

23  Q.   What does this mean?  Why is the DW here in  
24           black and the DW over here in red?

25  A.   I don't know.

1 Q. You don't know? You don't remember?

2 A. I remember, but I don't know why you got black

3 DW over here, then you've got a red DW over

4 here.

5 Q. Did this diagram --

6 A. Why it ain't got no red DJ right there.

7 Q. This particular diagram was done with you and

8 the two detectives, Detective Corbett and

9 Detective Caballero, on March 14th of 2004;

10 correct?

11 A. Everything that's in black was what I was

12 shown in the detective room, all this new red

13 stuff just appeared.

14 Q. Oh, the new red stuff got added in later?

15 A. No, it just got it, yes, it did. On my paper

16 it ain't got no red dots.

17 Q. Like this one that's a photo that doesn't

18 color anything?

19 A. It's black. That's what I'm saying. I'm

20 trying to correct you that it wasn't red until

21 now that I'm on the stand. It was black,

22 that's what I'm telling you.

23 Q. Okay. So in other words, the copy that you

24 saw was all black?

25 A. Yeah. And you asked me what was the red and

1 the red DW and the red DD. I don't know.

2 ATTORNEY GRIFFIN: Let me mark  
3 this one, sir.

4 (Exhibit Number 39 was marked for  
5 identification.)

6 BY ATTORNEY GRIFFIN:

7 Q. This is Exhibit 39, is it, except for the  
8 coloring?

9 A. Okay. You should have said that the first  
10 time.

11 THE COURT: Mr. Jennings, stop.

12 THE WITNESS: I'm just trying --

13 THE COURT: Answer the question  
14 that's being put to you, sir.

15 BY ATTORNEY GRIFFIN:

16 Q. Except for the coloring, are they the same?

17 A. Yeah, they're the same.

18 Q. When you were with the police on March 14th  
19 did they use a red pen to distinguish when you  
20 were saying where Danny was before and where  
21 he was during the shooting?

22 A. No, they didn't.

23 Q. Is it your testimony to this jury that this  
24 red ink on this page, Exhibit 38, with the  
25 initials DW in red and DD in red, that DW is

1 Danny Wilber during shooting and the DD is  
2 David Diaz after shooting, were added after  
3 you were done with the police, that they just  
4 added that in on their own? That's what must  
5 have happened?

6 A. No, you just throwing me off with the redness,  
7 that's all. You asked me the same question in  
8 a different way, I'm trying to explain it  
9 then. I got them telling me to tell the  
10 truth. I'm telling the truth and you're  
11 trying to twist me. I don't understand what  
12 you're trying to get at.

13 Q. Let's back up. March 14th of 2004 you're in  
14 the room with the police; correct? The two  
15 detectives?

16 A. Yeah, I told you correct.

17 Q. Okay. The detectives at some point pull out a  
18 diagram like this, which is Exhibit 38, but it  
19 doesn't have any of these initials on it;  
20 right?

21 A. They didn't put this one out on me, they had  
22 that one out on me because it was already in  
23 my file when they had my name ready to write.

24 Q. They had this one?

25 A. Yeah, they had copies of everybody's

1 statements and stuff and they were just  
2 showing me everybody's statements.

3 Q. My question is, did you tell them that you  
4 were right there and so they wrote in DJ to  
5 tell -- to indicate that that's what you were  
6 saying about where you were?

7 A. Well, before I got arrested, so everybody can  
8 understand this --

9 THE COURT: Mr. Jennings, answer  
10 the question.

11 THE WITNESS: I am.

12 THE COURT: No, no, no.

13 Mr. Jennings, stop.

14 Mr. Griffin, ask the question  
15 again.

16 BY ATTORNEY GRIFFIN:

17 Q. Did the police write the initials DJ in there  
18 because that's where you were telling them you  
19 were standing when all of this happened?

20 A. Correct.

21 Q. Did you -- did the police write in these  
22 initials DW, and I'm pointing to the ones that  
23 are on this page in black because that's where  
24 you said Danny Wilber was standing?

25 A. Yes.

1 Q. Did they then write at some point in the  
2 interview while you were there and with your  
3 knowledge and indication, this red DW to show  
4 where Danny Wilber was during the shooting?

5 A. Like I said again, it wasn't red, it was like  
6 that already before I got in to -- to get  
7 investigated for what happened, it was already  
8 sketched out, marked, everybody was already in  
9 their spots already.

10 Q. So all of --

11 A. I just had agreed to where I was standing at  
12 and was Danny standing there, and that's how  
13 the whole situation was.

14 Q. So it's your testimony to this jury that when  
15 the police first showed you Exhibit 38, the  
16 initials DW and AW, for example, right here  
17 next to each other already on the paper?

18 A. All these was already on the paper. Somebody  
19 already was grabbed already, so wherever how  
20 they sketched everybody to be where they was  
21 supposed to been at, that's -- they already  
22 had this before I even got arrested and got  
23 subpoenaed for this.

24 Q. So --

25 A. All this was sketched out already.

1 Q. I want to make clear that you're telling the  
2 jury that all of the initials, ON, RT, DJ, AW,  
3 DW and JD, along with the red DW and DD, when  
4 you saw them they were in black, were already  
5 on that page when the police first showed you  
6 that sketch?

7 A. Correct.

8 ATTORNEY GRIFFIN: I'm going to  
9 move Exhibit 38 into evidence and Exhibit --  
10 well, just 38 for now and ask that it be  
11 published.

12 THE COURT: Any objection?

13 ATTORNEY CHERNIN: To Exhibit --  
14 no.

15 THE COURT: Court will receive  
16 Exhibit 38 into the record, and it will be  
17 published to the jury.

18 (Exhibit Number 38 was received  
19 into evidence and published to the jury.)

20 THE COURT: It has been  
21 published to the jury. You may continue.

22 BY ATTORNEY GRIFFIN:

23 Q. Now that the jury has seen this, Mr. Jennings  
24 I'm going to ask, for example, this part where  
25 it says 'others' with arrows pointing towards

1 the victim and where those -- where those  
2 initials are in red, was that also just on the  
3 page when they showed it to you or did you  
4 tell them that?

5 A. It was already on the page when they showed  
6 me, and then I had to verify was I standing  
7 right here, 'cuz another witness, which the  
8 detective explained to me all these was marked  
9 already before you got here, I just want to  
10 verify it was you standing in this spot right  
11 here. And that's the question I was asked of  
12 me the whole time we was in there. And then  
13 they started asking, where was he laying, and  
14 all the other stuff they was asking.

15 Q. Was the word 'others' with those two arrows  
16 already on the page the first time the  
17 detectives showed it to you, yes or no?

18 A. Yes.

19 Q. And in fact that area of the living room where  
20 it says 'others,' you couldn't have seen that;  
21 right?

22 A. Couldn't have seen what? Can you ask that  
23 again?

24 Q. Well, the area of the living room sort of down  
25 in here where the word 'others' is, back sort



1 of toward the living room, you couldn't have  
2 seen that because your view was blocked off by  
3 those cabinets; correct?

4 A. Correct.

5 Q. And in fact, you were looking to your left  
6 sort of toward Oscar, not to your right where  
7 the shooting happened?

8 A. Correct.

9 Q. Okay. Do you know which witness it was that  
10 had given the police all of that information  
11 so that they could put all those initials on  
12 that page? Did they tell you it was Antonia?

13 A. Well, at the time they told me everybody that  
14 was there already gave a statement already  
15 before I gave a statement. That's why I  
16 stayed away. I didn't want to turn myself in  
17 or get any stories, because I wanted to wait  
18 till the police caught me, so then I can tell  
19 them the real true story.

20 ATTORNEY GRIFFIN: Nothing  
21 further.

22 THE COURT: Cross.

23 ATTORNEY CHERNIN: Thank you.

24 CROSS EXAMINATION:

25 BY ATTORNEY CHERNIN:

1 Q. Mr. Jennings, do you still have Exhibit 38 in  
2 front of you?  
3 A. No, I don't.  
4 Q. With the red diagram. With the red drawing.  
5 Isn't it true that you told the police that at  
6 the time of the shooting that Danny was  
7 engaged in a fight or in an entanglement with  
8 Jeranek Diaz, who you might know as Rock?  
9 A. Correct.  
10 Q. And on Exhibit 38, doesn't it show that the  
11 proximity of Danny during the shooting was  
12 that he was engaged with the initials JD, who  
13 is Jeranek -- you know to be Jeranek Diaz was  
14 Rock; correct?  
15 A. Correct.  
16 Q. So at the time of the shooting, according to  
17 what you were trying to portray, Danny was in  
18 front of David Diaz; is that correct?  
19 A. Correct.  
20 Q. And he was engaged in a -- I think you used  
21 the term tussle?  
22 A. Tussle.  
23 Q. With Jeranek Diaz; isn't that correct?  
24 A. Yes.  
25 Q. And the diagram, Exhibit 38, does it include

1           -- it says 'side porch.' Do you see where it  
2           says 'side porch?'

3    A.    Correct.

4    Q.    Did that refer to the door -- sorry -- that  
5           you see on Exhibit 14 where the diagram --  
6           where the -- the diagram that's not drawn to  
7           scale, shows the side porch, does that refer  
8           to that door?

9    A.    No, it don't.

10   Q.    The side porch is outside?

11   A.    Yes, it is.

12   Q.    Is that the door leading to the side porch?

13   A.    I think so.

14   Q.    Okay. Now, so that when you see the  
15          perspective of Exhibit 14, on Exhibit 14 at  
16          the time of the shooting, can you point to  
17          where Rock and Danny Wilber were standing?

18   A.    They were standing right here, like diagonal  
19          on angles.

20                           ATTORNEY GRIFFIN: Hang on one  
21          second, Mr. Chernin. Have him point to that  
22          again.

23                           ATTORNEY CHERNIN: Yes.

24   A.    It was diagonal right here from the corner of  
25          the table and Diaz was right here.

1 BY ATTORNEY CHERNIN:

2 Q. Which Diaz? Let's be clear.

3 A. Okay. Rock.

4 Q. Rock was near that door?

5 A. Yes, he was.

6 Q. And Danny was facing him?

7 A. Yes, he was.

8 Q. So his back was to you?

9 A. Like his -- like he was on an angle, but I

10 could see half of the front of him and like

11 the back of him.

12 Q. And from where you were standing, again,

13 let's -- I think you pointed to the outer edge

14 of the diagram?

15 THE COURT: Mr. Chernin, why

16 don't you have him hold the picture.

17 ATTORNEY CHERNIN: I'm sorry.

18 BY ATTORNEY CHERNIN:

19 Q. When Mr. Griffin asked you where you were

20 standing, you had pointed to the outer edge of

21 that photograph? I'm sorry, Mr. Griffin.

22 When you pointed to the -- you

23 pointed to the edge of that diagram, correct,

24 or that photograph, where -- as to where you

25 were standing? Where is the kitchen sink?

1 A. I was standing right here next to the kitchen  
2 sink leaning.

3 Q. Okay. And you were able to see to your right,  
4 and to your right and to what would be the  
5 north of the -- of the cabinet is where you  
6 saw your cousin Danny and Rock engaged in what  
7 you call the tussle; correct?

8 A. Correct.

9 Q. Now, on the diagram, Exhibit 38, you'll see  
10 that there is a -- a legend written to the  
11 right; is that correct? To the right on the  
12 diagram. Exhibit 38 -- you can put Exhibit 14  
13 down, I'll take that. On the right side of  
14 the piece of paper there's a bunch of names  
15 written; right?

16 A. Correct.

17 Q. And those names are ON; correct?

18 A. Say that again.

19 Q. The top one says ON for Oscar Niles?

20 A. Correct.

21 Q. And then RT, Richard Torres; correct?

22 A. Correct.

23 Q. And DJ, Donald Jennings; correct?

24 A. Correct.

25 Q. And AW, Antonia West; correct?

1 A. Correct.

2 Q. And DW, Danny Wilber; correct?

3 A. Correct.

4 Q. And JD, Jeranek Diaz; correct?

5 A. Correct.

6 Q. And then there's an X for, and it says unknown

7 Hispanic male?

8 A. Correct.

9 Q. Did you tell them that there was an unknown

10 Hispanic male standing there or was that

11 something -- how -- where did that come from?

12 A. Well, before I was arrested this sketch was

13 already mastered out, and they already had the

14 place of everybody placed already, all I had

15 to do was verify that there was a Mexican man

16 sitting at the table.

17 Q. And did you tell them that, that there was --

18 A. Yes, I did. They asked me did I know his

19 name. I didn't know his name, I never even

20 seen him before.

21 Q. Okay. And so when you -- at the time that

22 Danny was engaged in the tussle with Rock, did

23 you see David Diaz at that point in time or

24 were you -- what were you -- did you see David

25 Diaz to your right?

1 A. Yeah, I know I just -- I heard him. I know --  
2 I know they was over there arguing, so I  
3 glanced at Niles and I said, like, man, then  
4 pow, and I looked and everybody was reacting.  
5 Everybody paused. And that's when everybody  
6 vacated out of the kitchen.

7 Q. Okay. Now, did David Diaz fall away from or  
8 toward where Danny and Rock were fighting?

9 A. Well, he -- well, the way he fell, they was  
10 right here by the door and the table.

11 Q. Well, let's use -- let's just -- I'm sorry to  
12 interrupt you, but maybe it will be helpful if  
13 you have Exhibits 14 and 15 with you, and  
14 maybe you can show the jury what you're  
15 talking about as you're doing it. That's 14,  
16 this is 15, and I'm sorry, I know this is  
17 rather awkward, you know, maybe it would be  
18 helpful if I asked you to come down off the  
19 stand, we'll put that up on the board and  
20 maybe you can point on the board and show this  
21 to the jury. But you're going to have to  
22 speak up loudly, Mr. Jennings.

23 Now, is it -- looking at Exhibit  
24 38, which is that piece of paper, is  
25 everything that you're saying now consistent

1 with that diagram that Danny was in front of  
2 David Diaz at the time the shot was fired?  
3 Could you answer that question?

4 A. Yes, he was.

5 Q. Okay. Now, using, Exhibits 14 and 15, could  
6 you show this jury where Rock -- Jeranek Diaz  
7 and Danny were tussling at the time you  
8 observed David Diaz?

9 THE COURT: Mr. Jennings --

10 ATTORNEY CHERNIN: Speak up.

11 THE COURT: -- we're going to  
12 need you to speak up real loud and clear.

13 BY ATTORNEY CHERNIN:

14 Q. Donald, we're going to move you a little  
15 closer to the reporter, and hopefully -- I'm  
16 going to ask you -- can the members of the  
17 jury see the diagram -- or the photograph.  
18 And you're saying you can show better from,  
19 Exhibit 14 where everything was happening?

20 A. Yeah, 'cuz it shows the sink.

21 Q. Okay. Could you use Exhibit 14, the  
22 photograph, and tell this jury what you saw?

23 A. Well, I -- I see Danny Wilber standing in  
24 front of Diaz, he's leaning against the door  
25 already.



1 Q. Okay. There's two Diazes though, okay. Let's  
2 talk about the one that --

3 A. Rock.

4 Q. -- against the door, call him Rock please.

5 A. Rock. Rock was standing at the door, Danny  
6 was right here, and Antonia West was standing  
7 next to him drinking her beer, which is right  
8 here. This beer right here is hers. That was  
9 Niles, he was on this side, and he rolled a  
10 blunt, where we broke the blunt down, and I'm  
11 sitting right here, Niles is by the pantry,  
12 and it's like, I said it's a pantry on this  
13 side. So that's where Niles is placed.

14 I was placed like towards the  
15 'frigerator, like towards the bathroom, where  
16 Arterio or whatever his name was, RT, was  
17 standing right in front of the bathroom, like  
18 he just came out the bathroom. And then  
19 that's when he crossed me and they got to  
20 arguing. I guess he came to try to calm all  
21 of them down. So it was -- it was his house,  
22 he kept saying, this is my house, why don't  
23 you all calm down. That's when the tussle  
24 began, and then two seconds later, that's when  
25 the shot was rang.

1 Q. Let me ask you another question. At some  
2 point during this tussle when RT goes up, does  
3 Danny pop him in the face a couple times with  
4 a punch?

5 A. I don't know. He just -- he just pointed at  
6 him and that's when the smack came to smack  
7 his hand away, and that's when they got to  
8 tussling, and that's when the shot was fired.

9 Q. Okay. So as far as you're concerned, there's  
10 nothing inconsistent between what this diagram  
11 represents, Exhibit 38, and what you're  
12 showing to the jury now; is that fair to say?

13 A. Yeah. It's just spread it, so the placements  
14 on the paper is some time incorrect, because  
15 that's not where everybody was standing at,  
16 they were more squished together, because the  
17 kitchen, you can see it's not big like how the  
18 paper is.

19 Q. So the diagram -- or this Exhibit 38 doesn't  
20 give a good perspective of these, these  
21 pictures are better?

22 A. Correct.

23 Q. Now -- you can resume the stand.

24 Now, you do want to protect  
25 Danny; don't you?

1 A. Yes, I do.

2 Q. And how is it best that you can protect

3 Danny? By doing what?

4 A. Tell 'em the whole truth, nothing but the

5 truth.

6 Q. Now, this unknown Hispanic male, have you ever

7 been able to identify who that was?

8 A. I just know he had -- he was a Mexican, he had

9 like a shade over and like -- like a hoody

10 sweater, that's all he had on. And like the

11 hoody came to like right here, like where it

12 was over half of his -- his -- the back of his

13 head. And you can barely see any -- he was at

14 the table all drunk with his head down and he

15 ain't talk to nobody.

16 Q. Okay. I don't know if Mr. Griffin -- I think

17 he did go through some of these photos with

18 you. This is Javier Diaz Denoyos, Exhibit

19 19. Does that man look familiar to you?

20 A. Yeah, he look familiar, 'cuz I know him.

21 Q. So if you know him, he wasn't the unknown guy;

22 right?

23 A. He wasn't the unknown guy.

24 Q. Was he in the kitchen at the time of the

25 shooting?

1 A. No, he -- I don't recognize him being there.

2 Q. Tony Valdez, Exhibit Number 18, is that the  
3 unknown Hispanic male or is that somebody you  
4 know?

5 A. That's somebody I know.

6 Q. Is that your friend?

7 A. Associate.

8 Q. Okay. Isaiah Arroyo, Exhibit 20, is he known  
9 to you or is he an unknown Hispanic male?

10 A. He's an associate too.

11 Q. So you know him; right?

12 A. Correct.

13 Q. And you knew him on -- you knew all this --  
14 those three guys that we talked about so far,  
15 you knew all of them on January 31st of 2004;  
16 correct?

17 A. Correct.

18 Q. Now, Jeranek Diaz, Exhibit Number 21, he's not  
19 the unknown Hispanic male; is he?

20 A. No, he isn't.

21 Q. Did you know him as Rock or is that something  
22 that was introduced to you by Mr. Griffin or  
23 the police?

24 A. Rock.

25 Q. You knew him as Rock?

1 THE COURT: Is that a yes?

2 THE WITNESS: Yes.

3 BY ATTORNEY CHERNIN:

4 Q. And you knew him as Rock on January 31st of  
5 2004; is that correct?

6 A. Correct.

7 Q. Now Exhibit Number 8, Richard Torres, Vato,  
8 did you know him on January 31st of 2004?

9 A. I didn't know him, but he got a familiar face  
10 like he'd been around with people that I  
11 associate with. So that puts him in the  
12 associate category.

13 Q. Okay. So when you say know, you knew who  
14 he -- who he was, but you didn't associate  
15 with him as friends; right?

16 A. Correct.

17 Q. Now, none of those guys are the unknown  
18 Hispanic male; are they?

19 A. No, they're not.

20 Q. Now, when you met with the police on March  
21 14th of 2004, they took down a statement from  
22 you; isn't that correct?

23 A. Correct.

24 Q. And ultimately you refused to sign that  
25 statement because what reason?

1 A. 'Cuz the last -- the paragraph they got in  
2 there asking me some crazy question, and then  
3 they just put it in their own perspective on  
4 how the case was going. So they just wrote  
5 that down there to try to -- try to can him,  
6 basically.

7 Q. Okay. And what you were -- is it fair to say  
8 that you were offended by the police  
9 incorporating that paragraph?

10 A. Correct.

11 Q. And that paragraph had to do with the last  
12 time -- at least what's written is that it's  
13 the last time that you saw Danny Wilber with a  
14 gun; right?

15 A. Correct.

16 Q. And you told him ten years ago; is that  
17 correct?

18 A. Correct.

19 Q. And you just thought that that whole paragraph  
20 is just sort of nonsensical; correct?

21 A. Very correct.

22 Q. Now, the police you wanted -- is it fair to  
23 say that you wanted to tell the police the  
24 truth about what happened?

25 A. I did tell the truth.

1 Q. And the decision to write down the -- your  
2 statement, who made that decision? Was that  
3 your decision or was that the police?  
4 A. It's always the police's decision.  
5 Q. And did they give you an opportunity to put  
6 this statement of yours on audio tape, like  
7 record it?  
8 A. No, they didn't.  
9 Q. Did they give you the opportunity to make a  
10 video tape of what you wanted to tell them?  
11 A. No, they didn't.  
12 Q. Who chose the words, the specific words that  
13 were put on that piece of paper? Was that  
14 their choice or yours?  
15 A. That was their choice.  
16 Q. And is it fair to say that you were -- you  
17 yourself were in custody at the time of that  
18 interrogation?  
19 A. That was?  
20 Q. On March 14th.  
21 A. They arrest -- they tried to say they arrested  
22 me for the warrant, what had me there, but  
23 they was chasing me around to try to get me in  
24 custody for this.  
25 Q. And they were in control of the situation, not

1           you?

2    A.    Correct.

3    Q.    Is that correct?

4                       Now, did they ever give you the

5           opportunity to make your own diagram?

6    A.    No, they didn't.

7    Q.    And when the gunshot went off you didn't see

8           Mr. Diaz fall; did you?

9    A.    I just like seen his body just fall, then we

10          just seen blood spreading and we just ran.

11   Q.    And Mr. Diaz was falling from -- first of all,

12          did you see or observe anybody moving

13          Mr. Diaz's body before you left that house?

14   A.    No, I did not.

15   Q.    You're looking at Exhibit Number 15. Is that

16          the position that you recall Mr. Diaz being in

17          as you ran out of that kitchen?

18   A.    Yes, I did.

19   Q.    And at the time Mr. Diaz's feet were located

20          in this position with his knees roughly

21          parallel to the edge of the counter top; isn't

22          that correct?

23   A.    Correct.

24   Q.    And at any time did you see Danny Wilber

25          either reach behind the counter, or was he



1 standing at any time behind the counter with a  
2 gun pointed to the head of the young man who  
3 died, David Diaz?

4 A. No, I did not see that.

5 ATTORNEY CHERNIN: I have no  
6 additional questions of Mr. Jennings at this  
7 time.

8 THE COURT: Redirect.

9 REDIRECT EXAMINATION:

10 BY ATTORNEY GRIFFIN:

11 Q. Mr. Jennings, just for a minute if you can  
12 sort of imagine that this is the counter, and  
13 you have -- the sink's right here, you're kind  
14 of standing in that kitchen, over to your  
15 right is where your cousin and Rock are  
16 struggling; right?

17 A. They were like --

18 Q. Right to your right?

19 A. Just a little bit in front of the computer  
20 right here where she at. I'm -- I'm at where  
21 you at.

22 Q. Right. I'm you?

23 A. Yeah.

24 Q. And Oscar Niles is kind of right here?

25 A. No, he's like where Danny is sitting.

1 Q. Okay. Over here?

2 A. By the pantry.

3 Q. And Richard Torres walks in front of you

4 heading over towards the struggle; right?

5 A. Yeah, when the tussle -- yes.

6 Q. So as you look over here, if you had looked

7 over there, you would have seen Richard

8 Torres's back?

9 A. Who is Richard Torres? The RT?

10 Q. Yeah.

11 A. He just glanced past me just a second.

12 Q. He went past you, and he's now part of the

13 struggle, and if you turned and looked you

14 would have seen his back?

15 A. Danny is six eight and he's standing, and the

16 Mexican dude was nothing but like five

17 eight -- five nine. And when he did like

18 this, you can just see him, he's standing

19 that's. Like if I stand up right now, I would

20 be higher than all of you all 'cuz I'm six

21 eight. And that's what I seen him do. He

22 paused, and he went like this, and his eyes

23 got big like he was scared himself, so that's

24 how I knew that he was not the shooter.

25 Q. You done?

1 A. Yeah, I'm done.

2 Q. Okay. So as you were standing at the sink  
3 here and Mr. Torres, RT, walked past you, if  
4 you had looked to your right what you would  
5 have seen is Mr. Torres's back, yes or no?

6 A. Incorrect.

7 Q. What would you have seen?

8 A. I just -- like I said, the table was more away  
9 from me, it was a little -- just that little  
10 gap, as long as he walked past me, like he was  
11 basically almost like the same angle I'm  
12 standing, but he was to the right of me more.  
13 So when he walked that way, that's when you  
14 heard the shot. As soon as he walked past me  
15 you heard the shot. Everybody stopped, paused  
16 and ran. And there wasn't nothing else to be  
17 added.

18 Q. So of all the people in that room in the  
19 seconds after the shot, who had that natural  
20 human reaction after a shooting to go like  
21 this?

22 A. That would be anyone.

23 Q. No, in that room at that time who did that?  
24 Is that what you did, you heard the shot and  
25 went like this, throwing your hands up, expose

1           your innards?

2    A.    No, I jumped to see what --

3    Q.    Kind of like this?

4    A.    -- what was the loud noise at that time 'cuz

5           that was just an obvious noise that it's a

6           party, everybody kicking it, then you hear a

7           tussle, then five seconds later you hear a

8           gunshot that was real loud, that echoed the

9           whole house, and everybody reaction was to

10          just crunch down.

11   Q.    Except for Danny, whose reaction was to throw

12          his hands up in the air; is that right?

13   A.    Well, like I said before, he didn't like just

14          throw his hands up, he like weaved back, like

15          if the bullet came, like it went past him or

16          something, and he went like this, like if

17          somebody was shooting at him or something.

18   Q.    You said the police were chasing you around?

19   A.    I was just being sarcastic at that -- that

20          word.

21   Q.    In other words, you knew for a while the

22          police were looking for you and wanting to

23          talk to you about this case?

24   A.    Yes, I did.

25   Q.    And Mr. I want to tell the truth, I want to

1           get the truth out Donald Jennings, went right  
2           to the police and told 'em the truth?

3    A.    Correct.

4                           ATTORNEY GRIFFIN:  Nothing  
5           further.

6                           THE COURT:  Recross.

7                           RE CROSS EXAMINATION:

8    BY ATTORNEY CHERNIN:

9    Q.    Now, again, Mr. Torres, according to your  
10          testimony in direct for Mr. Griffin, you  
11          testified was pulling on Danny, the back of  
12          Danny's coat; correct?

13   A.    He -- he went to grab his coat, but as he  
14          already went to grab him, Danny already went  
15          like this, and he was scared, like, oh.

16   Q.    And the two closest people to Mr. Diaz as he  
17          was falling forward shot, the people closest  
18          and in front of him were Rock and your cousin  
19          Danny; correct?

20   A.    Correct.

21   Q.    And this reaction that Mr. Griffin would have  
22          -- had you have of putting his arms up, was  
23          that a reaction of -- of -- in your  
24          observation was that a reaction of backing  
25          away on Danny's part or was he being pulled

1 away at that moment by Torres? What was  
2 happening? I mean, what was causing Danny to  
3 go backwards or put his hands up?

4 A. Well, he a big guy, ain't nobody -- ain't no  
5 little dude just going to grab him, he ain't  
6 going to budge that way. He did that  
7 intentionally on himself to move back and like  
8 move out the sound of the -- the sound of the  
9 shot. Everybody move like if they was getting  
10 shot at. Everybody moved, didn't nobody know  
11 where the gunshot came from.

12 Q. And you could not see or observe who did that  
13 shot; is that correct?

14 A. Yeah, I couldn't see past the counters. The  
15 counters is blocking me at the top. If I'm  
16 leaning against it the counters are leaning  
17 right here, I can't see nothing past the  
18 counter. If I look straight all I see is the  
19 door of the outside.

20 Q. And the counters you're talking to are the  
21 upper counters that are depicted in Exhibit  
22 14; is that correct?

23 A. Correct. So that cut off -- that did -- that  
24 cut off my eyesight of seeing a shot that was  
25 taken by somebody, but it wasn't Danny.

1 Q. Mr. Jennings, did -- did you know or not know  
2 whether there was anybody coming from the  
3 upstairs at the time of the fight?

4 A. I couldn't -- I couldn't -- I wouldn't even  
5 recognize that.

6 Q. You didn't hear anything or see anything?

7 A. 'Cuz once you heard the tussle everybody  
8 attention just drew on the tussle. They  
9 wasn't no trying to hear this, hear this, hear  
10 that, it was just I heard a tussle, it was  
11 loud, then right after that, two -- five  
12 seconds later you heard a shot, there wasn't  
13 no time to look and do all what -- what  
14 everybody is trying to say you could have did  
15 at the time of the shot, but it was everybody  
16 scared anyway once they hear a shot come out  
17 of nowhere.

18 I ain't seen no gun the whole  
19 day, then I hear a gunshot, that will scare me  
20 too. I think somebody shooting in the house  
21 or something, that would just be my reaction.

22 Q. And David Diaz, had he been there long, to  
23 your recollection? I mean, how long was David  
24 Diaz standing there before the shot occurred?

25 A. Diaz as in Rock?

1 Q. I'm sorry, not Rock, 'cuz you said he's in  
2 this tussle with Danny. I'm talking about  
3 Mr. Diaz, the dead man, how long was he there  
4 before -- do you recall him being there?

5 A. I don't even recall him even in the kitchen or  
6 none of that. Like I said, they showed he was  
7 coming from the hallway, I guess he was coming  
8 to the tussle too, I guess. And then that's  
9 when you heard the shot and everybody paused  
10 and vacated the house.

11 Q. Now, Danny -- you didn't see or observe --  
12 Danny's involved in a fight basically with two  
13 guys; right?

14 A. Correct.

15 Q. Jeranek, Rock and Vato, you don't see him  
16 drawing a gun out on either Vato or Rock; do  
17 you?

18 A. No, I don't.

19 ATTORNEY CHERNIN: I have nothing  
20 further at this time.

21 THE COURT: Redirect.

22 ATTORNEY GRIFFIN: Nothing.

23 THE COURT: You may step down.

24 THE WITNESS: Okay.

25 (Witness excused.)



1                   ATTORNEY GRIFFIN: Doctor  
2           Jentzen.  
3                   (Side bar.)  
4                   THE COURT: I'm going to have you  
5           raise your right hand and my clerk will swear  
6           you in.  
7                   JEFFREY JENTZEN, called as a  
8           witness herein, having been first duly sworn,  
9           was examined and testified as follows.  
10                  THE CLERK: Please be seated.  
11                  THE COURT: Doctor, what I'm  
12           going to ask you to do is to begin by stating  
13           your full name for the record, spelling your  
14           first and last name.  
15                  THE WITNESS: Doctor Jeffrey  
16           Jentzen. J-E-F-F-R-E-Y, J-E-N-T-Z-E-N.  
17                  THE COURT: You may begin.  
18                  DIRECT EXAMINATION:  
19   BY ATTORNEY GRIFFIN:  
20   Q.   Sir, what do you do for a living?  
21   A.   I'm a medical examiner for Milwaukee County.  
22   Q.   How long have you been doing that?  
23   A.   Since January of 1987.  
24   Q.   As the medical examiner for Milwaukee County,  
25        what are your -- forgetting your

1 administrative duties, as a general rule what  
2 is it you do for a living?

3 A. I'm a forensic pathologist, I perform  
4 autopsies and I supervise other forensic  
5 pathologists within the office. I also  
6 oversee a forensic drug testing laboratory and  
7 testify in courts of law.

8 Q. How long have you been doing that?

9 A. For approximately 20 years.

10 Q. And if you had to estimate about how many  
11 autopsies you've done, your number would be?

12 A. I probably do about 250 autopsies personally  
13 myself each year and I supervise probably two  
14 to three times that number.

15 Q. Is it fair to say that in your particular  
16 profession as well, one doctor may do an  
17 autopsy, another will review the work and  
18 verify findings, things like that?

19 A. Yes.

20 Q. When you talk about an autopsy, why would your  
21 office -- obviously not every death in  
22 Milwaukee County ends up in an autopsy -- when  
23 are you doing an autopsy?

24 A. Our office is statutorily or legally required  
25 to investigate sudden and unexpected deaths,

1           and that includes deaths due to accidents or  
2           suicide, for example, or homicide cases or  
3           cases in which a person would die suddenly and  
4           unexpectedly without a known medical history.

5    Q.   Are you and your -- the people that work for  
6           you that do autopsies, to start with, are you  
7           all doctors?

8    A.   Yes.

9    Q.   What is it -- what kind of study and practice  
10          do you become? What you are now?

11   A.   Well, we do four years of medical school and  
12          then we do a specialized training in  
13          pathology, which would be anatomic clinical  
14          pathology. And after that we do a year of  
15          special training in forensic pathology.

16   Q.   When we talk about an autopsy, what are the --  
17          again, very basically, what are the steps  
18          involved?

19   A.   Well, typically it is the examination of a  
20          dead person, and we look at the outside of the  
21          body, when the body's clothed or how he would  
22          receive it, we would photograph the body, we  
23          would make any -- we would collect any  
24          evidence or anything we saw in the body. And  
25          then we undress the body, wash the body off,

1           and then we rephotograph and reexamine the  
2           body, looking for any evidence or trauma.

3                       And then following that we would  
4           do an internal examination where we open the  
5           body with a surgical incision, we look at the  
6           body's organs for the purposes of detecting of  
7           any natural disease or looking for trauma. We  
8           would also recover any evidence that might be  
9           in the body, and we would recover blood and  
10          body fluids and even portions of organs to do  
11          drug testing on it at a future date within the  
12          laboratory.

13                     ATTORNEY GRIFFIN: Judge, I  
14          believe there's a stipulation between the  
15          parties with regard to Doctor Jentzen's  
16          qualifications to testify as an expert.

17                     THE COURT: Is that correct?

18                     ATTORNEY CHERNIN: That is  
19          correct.

20                     THE COURT: So stipulated.

21                     ATTORNEY GRIFFIN: And this is in  
22          the field of forensic pathology.

23                     THE COURT: So stipulated.

24          BY ATTORNEY GRIFFIN:

25          Q. Doctor, I'm going to show you what's been

1 marked as Exhibit 32. Do you recognize it?

2 A. Yes. Exhibit 32 is an autopsy performed on an  
3 individual by the name of David Diaz. And it  
4 is -- has an identification number given in  
5 our office as 04485. And that's the number.  
6 And it consists of an autopsy protocol of nine  
7 pages, and then there is an inherent  
8 laboratory test on the back of the -- of this  
9 report.

10 Q. This autopsy was performed by whom?

11 A. Doctor Mary Mainland.

12 Q. And --

13 ATTORNEY CHERNIN: Excuse me just  
14 a moment.

15 (Discussion off the record.)

16 BY ATTORNEY GRIFFIN:

17 Q. You have reviewed all of the work done on this  
18 case though and are ready to testify about  
19 cause of death and things like that and give  
20 findings to a reasonable degree of medical  
21 certainty?

22 A. Yes, I am.

23 Q. Let's start at the end of it, if you will.

24 What killed David Diaz, to a reasonable degree  
25 of medical certainty?

1 A. He died as a result of a gunshot wound to the  
2 head.

3 Q. What was it about that gunshot wound to the  
4 head, in other words, more specifically, what  
5 happened to his body that -- that made it that  
6 gunshot wound kill him?

7 A. The bullet basically traversed his brain and  
8 severed his spinal cord at the junction of the  
9 brain. And basically that is where the body  
10 gets signals to breathe and for heart rate,  
11 and that area was completely destroyed by the  
12 wound.

13 Q. Do you remember where the wound went in?

14 A. Yes.

15 Q. Where?

16 A. It entered in the upper portion of the left  
17 scalp, and if I can show.

18 Q. If you would.

19 A. There was a -- it was one and a half inches  
20 below the top of the head, and about one --  
21 two and a half inches from the mid line. So  
22 it was in the left back portion of the scalp  
23 area.

24 Q. And did there -- that's the entrance wound?

25 A. Correct.

1 Q. How are you able to distinguish between an  
2 entrance wound and an exit wound with  
3 gunshots?

4 A. Well, by looking at the wounds there an  
5 entrance wound have a particular appearance.  
6 It has an abrasion area around it where the  
7 bullet enters the skin. In this case there  
8 was also some soot and powder deposition that  
9 was surrounding the entrance wound. Also, we  
10 look at the skull underneath the entrance  
11 wound, and it has a characteristic fracture or  
12 a bevel pattern that we look at on the bone.  
13 So by looking at the bone under the -- under  
14 the scalpel we can confirm that that's an  
15 entrance or an exit wound.

16 Q. Now you've talked about soot and powder. What  
17 does that mean to you when you're doing an  
18 autopsy and you see an entrance gunshot wound?

19 A. Well, when a weapon is fired, a rifle or a --  
20 a handgun is fired, the bullet exits the end  
21 of the barrel, but also powder from the  
22 cartridge exits with the bullet. And as  
23 powder is both burnt powder which comes out in  
24 the form of a smoke pattern, what we call  
25 soot, and it's also unburnt powder granules,

1           which come out in a spray that I would -- I  
2           would say is very similar to the size of  
3           grains of salt, which is the powder. And that  
4           comes out in a very high velocity, it strikes  
5           the skin and it leaves a mark.

6   Q.   When you look at -- do those names have a --  
7           those marks, excuse me, have a name?

8   A.   Yeah, we call it stippling, or an older term  
9           might be powder tattooing.

10  Q.   Does that indicate to you to some degree how  
11          close the barrel of the gun is to that  
12          entrance gunshot wound area on the victim's  
13          head?

14  A.   Yes.

15  Q.   And what does it tell you?

16  A.   Well, as the soot and powder comes out of the  
17          end of the weapon, the farther away then  
18          there's no -- it's too far away for the soot  
19          to deposit onto the target, so you just get  
20          the stippling. And a little farther away  
21          you'll go out to a point where there's no  
22          stippling at all to the scalp, and so we call  
23          that a distant gunshot wound.

24  Q.   In this particular case do you, to a  
25          reasonable degree of medical certainty, have



1           some estimate as to how far away the gun  
2           barrel was, based on the powder and soot that  
3           you found?

4    A.    I do.

5    Q.    What is that?

6    A.    Two to three inches.

7    Q.    The gun itself was two to three inches from  
8           the scalp of the victim at the time that gun  
9           was fired?

10   A.    Yes.

11   Q.    Did you recover -- strike that.

12                       Once you identify and observe  
13           the -- sort of the exterior, the stippling,  
14           the entrance gunshot wound, what do you do in  
15           terms of the bullet path through the victim's  
16           head?

17   A.    Well, we -- as part of the examination we do a  
18           complete examination, so we would -- we would  
19           reflect the scalp area back, we would look at,  
20           as I mentioned, the skull, we'd examine the  
21           skull perforation. In this case there was  
22           marked shattering of the skull, so the skull  
23           was fragmented in a number of different  
24           pieces. We then open the skull cap up and we  
25           follow the wound track through the brain

1 tissue itself.

2 And in this case the wound had  
3 gone through not only brain tissue, but it  
4 severed the spinal cord or the brain stem at  
5 the junction of the brain and it had continued  
6 in a left to right direction, and had exited  
7 through the front, what we call the maxillary  
8 sinus, which is right in the cheek area is a  
9 sinus. So it came out of the right maxillary  
10 sinus, and there was an exit wound, and I'm  
11 pointing to the area just to the right of  
12 my -- the nasal bridge or to the nose --  
13 bridge of my nose is where the exit wound came  
14 out.

15 Q. I'm going to ask you, Doctor, again, I know  
16 you pointed to both, I'm going to ask you to  
17 use both hands and point with one hand to the  
18 entrance wound and with one hand to the exit  
19 wound at the same time so the jury can kind of  
20 get a feel for the path of that bullet through  
21 Mr. Diaz's head.

22 A. The wound entered from the left superior or  
23 upper scalp, one and half inches down from the  
24 top of the head and two and a half inches from  
25 the midline, so it was basically in the back

1 corner. And it exited through the right  
2 lateral nasal bridge, just to the right of the  
3 nasal bridge. So it was going from a left to  
4 right and top to bottom direction and back to  
5 front.

6 Q. When we talk about top to bottom, for example,  
7 you talked about an inch and a half down from  
8 what would be the very top of his scalp, when  
9 it came out over about by his nose there how  
10 far down was it? In other words, how many  
11 inches downward had that bullet traveled?

12 A. Could I refer to my records?

13 Q. Please do.

14 ATTORNEY CHERNIN: Doctor, if I  
15 might interrupt, what portion --

16 THE COURT: One moment. One  
17 moment. This is on direct examination, if you  
18 have a question just ask counsel to clarify it  
19 for you.

20 A. It was five and a half inches below the top of  
21 the head.

22 BY ATTORNEY GRIFFIN:

23 Q. So from the one and a half inch to five and a  
24 of inches as the bullet enters and it's going  
25 down it has a drop, if you will, of four

1 inches in height?

2 A. Correct.

3 Q. I want to talk for a minute about what you  
4 refer to as the anatomic position and how that  
5 affects the way you look at things and how  
6 when you say -- when I ask you questions about  
7 where the victim may have been, those kinds of  
8 things, we can answer always in reference to  
9 the anatomic position. Explain what that is  
10 to the jury, to you.

11 THE WITNESS: Can I stand, Your  
12 Honor?

13 THE COURT: You may.

14 A. The anatomic position is a position that we  
15 use to describe wounds, and if I could just  
16 demonstrate off of a sketch that is -- that we  
17 would use in our regular course of business,  
18 is a general sketch. And we use this sketch  
19 to describe positions. And so this is the  
20 anatomic position that I described. Eyes  
21 looking front with a person standing straight  
22 and the hands turned. So this is how we  
23 describe wounds.

24 We have the person laying on an  
25 autopsy table, which assists us in making

1       those determinations, but we have to have some  
2       reference point to describe the position. So  
3       we'll go top to bottom, right to left, front  
4       to back, using the reference to the anatomic  
5       position.

6   BY ATTORNEY GRIFFIN:

7   Q.   This particular bullet, when it went through  
8       Mr. Diaz's head, stayed on pretty much a  
9       straight line?

10  A.   Yes.

11  Q.   And if we took the -- took the entrance  
12       gunshot wound as one point on the line and the  
13       entrance and the exit as the other point, you  
14       have a line; correct?

15  A.   Correct.

16  Q.   And then a third point on that line of course  
17       would be the barrel of the gun, in other  
18       words, you said I think two to three inches  
19       away?

20  A.   Correct.

21  Q.   That would be a third point on that line;  
22       correct? Could be?

23  A.   It would be on the line, yes.

24  Q.   Right. Once, for example, we fixed that line,  
25       essentially we have the exit gunshot wound,

1 the entrance gunshot wound, and then the  
2 barrel of the gun. The barrel of the gun to  
3 maintain that line, depending on how the  
4 victim moves out of the anatomic position, the  
5 gun barrel is always going to have to sort of  
6 move with it; correct?

7 A. Yes.

8 Q. In other words --

9 A. Assuming the position of the wound track, then  
10 you have to assume the position of the weapon.

11 Q. Right. In other words, may I use Detective  
12 Casper here, if you'd stand up for a minute,  
13 approximating for a minute with -- this is a  
14 toy gun for the record, Judge, it's just  
15 plastic, I had the bailiff look at it -- once  
16 we have sort of an approximation of the line  
17 of -- and we hold the gun here, you don't know  
18 because you weren't there, exactly how the  
19 victim was standing at the time that that  
20 bullet went into his head; correct?

21 A. Or if the individual was standing at all,  
22 right.

23 Q. He could have been sitting?

24 A. Correct.

25 Q. My point is, as we turn the victim's head, say

1           one way or the other, even though we have to  
2           kind of move the gun to keep that line, if you  
3           will, between exit, entrance and barrel or --  
4           or the -- where the bullet comes out?  
5    A.    That's a correct assumption, yes.  
6    Q.    Okay. And so when we talk about anatomic  
7           position for your purposes everything's  
8           straight?  
9    A.    Correct.  
10   Q.    Okay.  
11   A.    The body is straight.  
12   Q.    Throughout this wound path did you recover any  
13           physical evidence, not counting body parts or  
14           materials of Mr. Diaz, but more specifically,  
15           bullet pieces?  
16   A.    Yes. Doctor Mainland was able to recover  
17           fragments of the bullet as it went through the  
18           brain tissue and the right maxillary sinus.  
19   Q.    So were there lead fragments in one particular  
20           spot or different spots along the wound path?  
21   A.    Different spot along the wound path.  
22   Q.    I'm going to show you what's been marked as  
23           Exhibit 23. What are those?  
24   A.    This is a bullet envelope that is used in our  
25           office. It's closed with this evidence tape,

1 and it is signed by Doctor Mainland's  
2 signature that I recognize. And this plastic  
3 container contains probably four small lead  
4 colored metal fragments.

5 Q. Those particular fragments, if you could  
6 describe the best you can, not which one's  
7 which, how close was the first one, say to the  
8 entrance wound, how close was the last one to  
9 the exit wound?

10 A. Well, my -- I reviewed the x-ray before coming  
11 to court and the -- the bullet starts to  
12 fragment as it strikes a portion of the bone  
13 typically. So there's a small amount of  
14 fragmentation or very microscopic around the  
15 entrance wound, but most of the larger  
16 fragments are in the right maxillary sinus,  
17 and as the bullet is exiting the skull but  
18 entering the facial bones.

19 Q. So when you talk about the maxillary sinus, in  
20 other words, there are some pieces right near  
21 the exit wound?

22 A. Correct.

23 Q. When a person is shot standing up, for  
24 example, and then they fall to the floor, can  
25 pieces come out of that wound? That exit



1           wound?  Other pieces?

2    A.    It's possible.

3    Q.    Is it possible that when he falls there

4           further back and as he hits the ground, they

5           move toward the exit wound?

6    A.    I think that would be very unlikely.

7    Q.    When you say it's unlikely, why do you say

8           that?

9    A.    Because the material is -- is stuck within

10          brain tissue far back, and there is a -- there

11          is a temporary cavity when -- when the tissues

12          and the bones expand, but then when the cavity

13          collapses upon itself, that cavity is fairly

14          narrow.  There can be bullet fragments, et

15          cetera, especially over the maxillary sinus

16          that may be expressed, but I think it would be

17          very unlikely that there would be material

18          higher up within the brain tissue that would

19          come out.

20   Q.    Do you remember how tall Mr. Diaz was?

21   A.    He was five feet eight.

22   Q.    And as far as you know, was he -- he was

23          wearing Shoes?  I mean you saw the pictures

24          from the scene; correct?

25   A.    Correct.

1 Q. And the bullet was an inch and a half down, so  
2 the bullet went in, again, assuming he wasn't  
3 wearing any shoes, at a height off the ground  
4 of five foot six and a half?  
5 A. Roughly, yes.  
6 Q. Roughly. Okay. And it went down about four  
7 inches, so it came out then about five two and  
8 half, again, assuming no shoes and rough?  
9 A. Correct.  
10 Q. Okay. How long does Mr. Diaz live?  
11 Approximately. As best you can tell.  
12 A. I have an opinion.  
13 Q. Your opinion, that's what I mean.  
14 A. I think he died immediately.  
15 Q. Would he have been able, for example, to run,  
16 walk, step, dance, anything like that at all?  
17 A. No.  
18 Q. Are you able to tell, based on what you'd  
19 seen, whether he was in fact moving at the  
20 time he was shot?  
21 A. I don't have an opinion, no.  
22 Q. Do you remember how much he weighed?  
23 A. I believe he is -- if I could refer to my  
24 records.  
25 Q. Please.

1 A. I believe he was 250 pounds. Yes, he was 258  
2 pounds.

3 Q. Is he, by your -- by medical standards,  
4 someone you would call heavyset?

5 A. Yes.

6 Q. Even obese, as you refer to it in your report?

7 A. It was Doctor Mainland's term, yes.

8 Q. Doctor Mainland's term. Was -- were there any  
9 other signs, notable signs, important signs to  
10 you guys in terms of any injury on Mr. Diaz?

11 A. I believe there was some old bruises,  
12 insignificant, on his leg, but other than that  
13 there was no significant trauma.

14 Q. For example, was there anything that showed  
15 that as he fell to the floor, he hit and  
16 bruised his head or face or anything like  
17 that?

18 A. I didn't recall any of that, no.

19 Q. The bullet pieces or fragments that were found  
20 inside of Mr. Diaz, were you guys able to  
21 weigh those and give an approximate weight of  
22 those pieces?

23 A. If I could refer to the --

24 THE COURT: You're looking at

25 Exhibit 23?

1 THE WITNESS: I'm looking at  
2 Exhibit 23, Your Honor, and I see no -- if I  
3 could refer to my records. I don't see any  
4 weight on that.

5 BY ATTORNEY GRIFFIN:

6 Q. Referring to page 5, the second paragraph  
7 under evidence of injury, the last sentence in  
8 that paragraph.

9 A. Yes. Okay. Doctor Mainland mentions in that  
10 second paragraph that fragments of the bullet  
11 totaling 0.7 grams were recovered from the  
12 cranial cavity and the right maxillary sinus  
13 and orbital region, which orbital region is  
14 the eye socket, basically.

15 Q. All of the opinions that you've given here  
16 today are to a reasonable degree of medical  
17 certainty?

18 A. Yes.

19 ATTORNEY GRIFFIN: Nothing  
20 further.

21 THE COURT: Cross.

22 CROSS EXAMINATION:

23 BY ATTORNEY CHERNIN:

24 Q. Bullet fragments that are found outside of the  
25 body, would those have been fragments that

1           passed through the body?

2    A.    Yes.  It -- it very well could have been, yes.

3    Q.    When you told Mr. Griffin that it was  
4           extremely unlikely that a bullet fragment  
5           would have been found some distance away from  
6           the body, it could not have been the result of  
7           the body falling and hitting the floor and  
8           fragments shooting out, is that what you meant  
9           by it was unlikely?

10   A.    Yes.

11   Q.    And when -- is there any way for you to tell,  
12           based upon the autopsy, the direction of the  
13           barrel as it's placed at the head?  Was it  
14           definitely this is -- are you certain to a  
15           reasonable degree of medical certainty that  
16           this was a shot from the back?

17   A.    Yes.  I -- if I could, the -- the weapon was  
18           held to the back of his head.  Now, if his  
19           head was turned to the -- if I could  
20           demonstrate -- if his head was turned to the  
21           right, then -- then the wound would have come  
22           in from the left side.  And I think as far as  
23           you're referring to as the back, I think  
24           you're referring to the back of torso,  
25           anterior to posterior direction, not in the

1 right to left direction.

2 Q. So the back left side of the head?

3 A. Right. It's the back of the head, but as --

4 as mentioned before, the head moves.

5 Q. And if there is a shot, the head -- I mean

6 whatever direction the head is shooting -- or

7 is turned, is going to be the path that the

8 bullet will follow when it comes -- when the

9 shot goes down four and a half inches, roughly

10 four inches, into the sinus cavity; is that

11 correct?

12 A. Correct.

13 Q. And if the head were turned in a direction,

14 would one expect that any fragments that

15 passed through the head would be found in the

16 direction that the bullet was taking through

17 the head?

18 A. No, I wouldn't expect that.

19 Q. What would you expect?

20 A. I would expect that when the bullet came out,

21 that portion of the bullet that came out would

22 exit in a straight direction but would bounce

23 and ricochet throughout the scene. It would

24 hit the floor, it may go to either direction,

25 and it wouldn't come out -- it wouldn't be

1 found in -- I wouldn't expect it to be found  
2 in an exact straight line position from where  
3 the weapon was fired and where it exited from  
4 the front part of his face.

5 Q. So if it were a little off center from that  
6 straight line, that wouldn't surprise you?

7 A. No, it would not.

8 Q. But you definitely expect it to follow in a  
9 line unless it did hit something; correct? I  
10 mean --

11 A. Well, it --

12 Q. It would follow a straight line unless  
13 something knocked it out of that straight  
14 line?

15 A. Well, it would end up striking something,  
16 whether it was on the floor or the wall, or it  
17 would eventually strike something that would  
18 change its direction.

19 Q. And if it -- like, for example, if -- if the  
20 bullet path had gone through the head, toward  
21 what's portrayed in this diagram, Exhibit 1,  
22 as a wall, one would expect to see the  
23 fragment marks on that wall; correct?

24 A. I would expect that the -- that the exiting  
25 bullet would have ricocheted off the wall and

1           been in some other place in the room.

2   Q.    If the direction had been toward that wall;  
3           correct?

4   A.    Well, if the exit -- if the bullet exited in  
5           the position that it would strike the wall I  
6           would expect it to strike the wall.

7   Q.    And bounce anywhere?

8   A.    And bounce anywhere.

9   Q.    And when -- when a bullet passes through the  
10          brain, one would expect organic matter,  
11          whether it be blood or gray matter, to follow  
12          the path in the trajectory of the shot; is  
13          that correct?

14   A.    There would be a certain amount of biological  
15          spray that would occur with the exit wound,  
16          correct.

17   Q.    So if, for example, one were shot next to this  
18          wall, one would expect some biological  
19          material if -- if -- if that was a direction,  
20          that one would expect biological material to  
21          be found on that wall?

22   A.    It would depend on how far away the individual  
23          was from the wall.

24   Q.    Fair enough.  Oh, Doctor Jentzen, do you use  
25          the term intermediate wound?



1 A. Intermediate wound? Yes.

2 Q. What does an intermediate wound mean to you?

3 And -- and let me ask you this, is that a term  
4 of art in the forensic pathology profession  
5 such that you and Doctor Mainland would both  
6 use that term?

7 A. Yes. The -- the term intermediate range,  
8 there's -- there's two terms, one's an  
9 intermediate target and the other is an  
10 intermediate range. Intermediate range would  
11 mean that the -- that the target was far  
12 enough away so you get powder stippling onto  
13 the target. And intermediate target would  
14 imply that there is a -- something in between  
15 the end of the weapon and the eventual -- in  
16 this case the head, that would -- that the  
17 bullet had to pass through in order to strike  
18 the target. So in this case it uses  
19 intermediate range.

20 Q. Well, if -- if you were to hear that Doctor  
21 Mainland states that the wound path was from  
22 back to front, you'd agree with that; correct?

23 A. Correct.

24 Q. And would you also agree with, Doctor Mainland  
25 also states there was soot and stippling

1           around the entrance wound, indicating there  
2           was an intermediate wound?

3    A.    Yeah, I think she's using that as an  
4           intermediate range wound.   Correct.

5    Q.    What does an intermediate range wound mean?

6    A.    It would mean that there was powder stippling  
7           on to the wound.   And I would -- I would use  
8           that term to describe just powder stippling,  
9           but she uses it in this case to include also  
10          some of the powder, meaning that it could  
11          be -- it's probably at a range between a close  
12          range gunshot wound and an intermediate range  
13          gunshot wound.   It's probably right at that  
14          cusp.

15   Q.    And -- and a contact wound would obviously  
16          be -- a close range would be a contact wound  
17          immediately pressed up against the flesh;  
18          correct?

19   A.    And if I could expound.

20   Q.    Yes.

21   A.    You would not see powder stippling on a  
22          contact wound, the powder would all be  
23          injected into the target.

24   Q.    And you expressed an opinion that it's two to  
25          three inches.   Is that consistent with an

1 intermediate wound?

2 A. I think it's closer. I think that's more  
3 consistent with a close range. My terminology  
4 would have been close range wound.

5 Q. So when you say two to three inches, you  
6 just -- you're -- you would say it's closer  
7 rather than intermediate? Intermediate means  
8 what to you?

9 A. Intermediate means probably in a -- depending  
10 upon -- these are all different handguns and  
11 it's just an estimation, but my estimation  
12 would be probably between six inches and  
13 probably two to three feet would be an  
14 intermediate range. But in this case we have  
15 a corona of soot and powder deposition around  
16 the wound that gives us a fairly accurate  
17 range of fire.

18 Q. And is that taken from Doctor Mainland's  
19 report?

20 A. Correct.

21 Q. Where do you see that, Doctor Jentzen?

22 A. In her description about the -- the -- the  
23 deposition of the powder stippling around the  
24 wound being one and a half inches in one  
25 direction and one and -- and a half inch in

1           one direction, et cetera.

2   Q.   Thank you.

3   A.   And also in my examination of photographs  
4       before testimony.

5   Q.   Okay.  So, Doctor, just so I'm not trying to  
6       be confusing, you used the term corona.

7       That's a term that you would have used based  
8       upon the measurements from --

9   A.   Correct.

10  Q.   -- from Doctor Mainland, but Doctor Mainland  
11       didn't use the word corona?

12  A.   That's my own terminology.

13  Q.   In your profession you would use that term to  
14       express the measurements that she used, the  
15       stippling being found one and a quarter inch  
16       superior, one and a quarter inch posteriorly,  
17       one half inch inferiorly, and one and a  
18       quarter inch anteriorly?

19  A.   Correct.

20  Q.   Those would indicate the corona, and so in  
21       other words, I'm motioning with my hand  
22       creating a circle, and roughly that would  
23       indicate the -- from the midpoint of the  
24       circle that would indicate the distances that  
25       you saw the powder burns?

1 A. Yes, that's correct.

2 Q. Okay. Thank you. I didn't mean to be  
3 confused, but she had not used that term, but  
4 I can understand where you are.

5 ATTORNEY CHERNIN: I have no  
6 additional questions of Doctor Jentzen.

7 THE COURT: Mr. Griffin.

8 ATTORNEY GRIFFIN: I have  
9 nothing.

10 THE COURT: Doctor, you may step  
11 down. Thank you, Your Honor. I'll take my  
12 copy.

13 (Witness excused.)

14 THE COURT: Ladies and gentlemen,  
15 we'll take a ten-minute break, we'll be back  
16 on the record at 11:15.

17 DEPUTY: All rise for the jury  
18 please.

19 (Jury out of box.)

20 THE COURT: You may be seated.  
21 Court notes that we had a side bar during --  
22 the court's had a side bar with the lawyers  
23 during Mr. Jennings' testimony, Donald  
24 Jennings' testimony, that involved the  
25 defense's objection to the question that I

1 believe Mr. Griffin had postured or was about  
2 to posture with respect to Mr. Jennings' first  
3 encounter with the police as it relates to  
4 their -- the police's investigation into this  
5 matter. And it was concern about the fact  
6 that there was the possibility that  
7 Mr. Jennings' answer may reflect that he was a  
8 warrant, and that they had -- he had been  
9 picked up on a warrant.

10 Mr. Griffin indicated that this  
11 was his witness and he was free to explore  
12 that, particularly the -- along the track of  
13 what subsequently followed and what the court  
14 permitted, which was the witness's willingness  
15 to indicate to the police at his first  
16 opportunity his belief that his cousin, the  
17 defendant, was not the shooter in this  
18 matter. After that was explained to the court  
19 and the defense -- the defense withdrew its  
20 objection and the court allowed the  
21 questioning to continue.

22 ATTORNEY CHERNIN: That is a  
23 correct statement, Your Honor. My concern at  
24 the time was that there would be an answer  
25 which would improperly violate the rules under

1 906.09. And based on Mr. Griffin's response  
2 to me I was satisfied that he had no intention  
3 of even trying to invoke that sort of a  
4 response, so therefore, I withdrew the  
5 objection based upon what Mr. Griffin said.

6 THE COURT: There was a second  
7 smaller side bar right at the beginning of  
8 Doctor Jentzen's testimony that had to do with  
9 the defense needing a comfort break. During  
10 that break the State indicated that the court  
11 should advise counsel, defense counsel, not to  
12 infringe on the jury box, and to limit his  
13 leaning on the jury box during the examination  
14 and cross examination of witnesses.  
15 Mr. Chernin acknowledged same and indicated  
16 that he would refrain from doing so.

17 Finally --

18 ATTORNEY CHERNIN: Judge, there  
19 was also -- if I might, there was an  
20 additional portion of that, was that we  
21 discussed the -- my stipulation to the  
22 credentials of Doctor Jentzen --

23 THE COURT: That's correct.

24 ATTORNEY CHERNIN: And --

25 THE COURT. As an expert --

1 ATTORNEY CHERNIN: As an expert.

2 THE COURT: -- in the field of  
3 forensic pathology.

4 ATTORNEY CHERNIN: And I did so.

5 THE COURT: The court understands  
6 that we need to at some point -- and this is  
7 probably as good an opportunity as any -- to  
8 talk a little bit about the State's use of  
9 demonstrative evidence, and having the defense  
10 put its objection on the record, and then  
11 having the court rule on it prior to the State  
12 introducing that evidence. I was not sure,  
13 Mr. Griffin, when it was that you were  
14 planning on doing that, so the timing of my  
15 ruling is -- is tied to that.

16 ATTORNEY GRIFFIN: I'm going to  
17 ask, if I may, Judge, only because it's 11:15  
18 and I've had Mr. Simonson here since 10:00,  
19 could we just -- could we deal with that right  
20 at the lunch break as opposed to now?

21 THE COURT: Again, that's --  
22 that's acceptable to the court. I just want  
23 to make sure, as I've advised the parties all  
24 along, that I know that's an issue and it  
25 needs to be put on the record. We've had a



1 discussion in chambers about it, which I've  
2 summarized earlier, but we need to put that on  
3 the record more fully, and we need to do that  
4 prior to any such demonstration occurring. So  
5 if that's not going to happen with  
6 Mr. Simonson's testimony, then I see no reason  
7 not to hold off on my ruling and the arguments  
8 on it until after his testimony.

9 All right. Guys, we're going to  
10 take a ten-minute break, we want to be back in  
11 our seats at 20 after the hour.

12 (Break taken.)

13 DEPUTY: All rise for the jury.

14 (Jury in box.)

15 THE COURT: Welcome back, ladies  
16 and gentlemen. Please be seated.

17 Mr. Simonson, I'm going to have  
18 you raise your right hand and my clerk will  
19 swear you in.

20 MARK SIMONSON, called as a  
21 witness herein, having been first duly sworn,  
22 was examined and testified as follows.

23 THE CLERK: Please be seated.

24 THE COURT: What I'm going to ask  
25 you to do, sir, is to begin by stating your

1 full name for the record, spelling your first  
2 and last name.

3 THE WITNESS: My name is Mark  
4 Simonson. M-A-R-K, S-I-M-O-N-S-O-N.

5 THE COURT: You may begin.

6 DIRECT EXAMINATION:

7 BY ATTORNEY GRIFFIN:

8 Q. Mr. Simonson, what do you do for a living?

9 A. I'm a firearm, tool mark examiner at the State  
10 Crime Laboratory here in Milwaukee.

11 Q. What does a firearm and tool mark examiner, in  
12 this case you, do every -- not every day, but  
13 almost every day?

14 A. We receive, receipt and report on firearms and  
15 firearm-related evidence, that being guns,  
16 bullets, cartridge cases, shotgun shells.  
17 Tool mark would be like trying to identify a  
18 bolt cutter, cutting a lock. We also do  
19 serial number restorations and perform  
20 distance determinations when asked.

21 Q. How long have you been doing that?

22 A. I'll have five years in the end of next month.

23 Q. And where have you worked as a firearm and  
24 tool mark examiner or some kind of similar  
25 position in your life?

1 A. Just here at the Milwaukee lab.

2 Q. Who is your boss?

3 A. Reg Templin.

4 Q. How long has Mr. Templin been doing that kind  
5 of a thing?

6 A. Over 30 years.

7 Q. How many times have you testified in courts  
8 here in Wisconsin as an expert witness in the  
9 field of firearm and tool mark examination?

10 A. Between ten to twenty.

11 Q. And when we talk about firearm and tool mark  
12 examination, how do you get into that line of  
13 work? What was your course of study, what was  
14 your training, that kind of thing?

15 A. Well, I have a bachelor of science with a  
16 minor in environmental law enforcement. And I  
17 also was very interested in guns all my life  
18 so I have a broad general experience before I  
19 came to the lab. But my lab is -- an examiner  
20 is kind of like an apprenticeship, I'll follow  
21 the head examiner around, work with him, see  
22 everything he sees and look at what he looks  
23 at. I've also attended an FBI gunshot residue  
24 course, and also a serial number restoration  
25 course put on by ATF.

1 Q. Have you ever testified in a courtroom where  
2 you weren't -- your opinions weren't accepted  
3 as expert opinions?

4 A. No.

5 Q. We'll start with an exhibit from this case,  
6 Exhibit Number 2.

7 ATTORNEY CHERNIN: Judge, I  
8 expect to be asking questions as well  
9 requiring opinions, and I'm stipulating to  
10 Mr. Simonson's credentials as an expert.

11 THE COURT: So stipulated.

12 BY ATTORNEY GRIFFIN:

13 Q. What is Exhibit Number 2?

14 A. It's a fired 38 378 caliber bullet jacket.

15 Q. You've looked at that before?

16 A. Yes.

17 Q. And just using that as an example, what steps  
18 did you take to be -- when you got that thing  
19 from the police -- the Milwaukee police;  
20 right?

21 A. That's correct.

22 Q. What steps did you take with that to identify  
23 it, to figure out what it was, to draw  
24 whatever conclusions you draw?

25 A. Well, what I'll first do, look at it, is look

1 at the shape and diameter of the bullet  
2 jacket. And I'll look at -- also when a gun  
3 is -- the bullet's fired it passes through the  
4 barrel of the firearm and that has what we  
5 call lands and grooves in it, in the rifling.  
6 You can think of it as like the inside of a  
7 nut and a bolt. The bullet's a little bit  
8 over sized and as it passes through the barrel  
9 it squeezes down a little bit and it's spun,  
10 and that's what makes it accurate.

11 Those impressions are also left  
12 behind on the bullet, that's how I'm able to  
13 make an identification as to whether this -- I  
14 could match a particular firearm as firing  
15 this particular bullet jacket. In this case,  
16 the bullet jacket has five lands and grooves  
17 impressed in it with a right-hand twist.

18 Q. Five lands and -- lands, L-A-N-D-S; right?

19 A. That's correct.

20 Q. And grooves with a right-hand twist. Now, if  
21 you had to explain that to a person who  
22 didn't -- who doesn't do what you do, like me,  
23 how would you explain what that is exactly?

24 A. Well, that is the, you know, like I was  
25 explaining with the barrel having high and low

1 spots in it, so it will -- when the bullet  
2 hits the barrel it's squeezed and spun, and  
3 those impressions are left behind on the  
4 bullet.

5 Q. In other words, as a bullet -- say you go and  
6 buy a bullet at Wal-Mart and put it in a  
7 particular gun, a particular 38 or 357, and I  
8 fire that bullet, and I had another 38 357  
9 with another bullet, when you look at those  
10 bullets can you tell the difference between  
11 gun number one and gun number two?

12 A. Yes.

13 Q. Does every gun, as a bullet goes down, leave a  
14 unique marking, so to speak, on that bullet?

15 A. Yes.

16 Q. So like snowflakes, every gun's different?

17 A. That's correct.

18 Q. When you talk about lands and grooves, are we  
19 talking about something you can't see or you  
20 only see with a microscope?

21 A. Lands and grooves, it's what we call a class  
22 characteristic. That's like a general  
23 characteristic to a particular gun. Like in  
24 this case five lands and grooves in a right-  
25 hand twist is characteristics of revolvers

1 manufactured by Smith & Wesson, Taurus and  
2 Ruger. That's a general. What we look for is  
3 individual, when we identify it to a  
4 particular gun, we're going from just  
5 observing the bullet down to the microscopic  
6 level.

7 Q. In other words, if you have a gun that's  
8 suspected in a particular shooting and a  
9 bullet that's suspected to have come from that  
10 gun, can you do something to be able to tell  
11 us to a reasonable degree of scientific  
12 certainty whether this bullet recovered by the  
13 police and this gun recovered by the police  
14 were used together?

15 A. That's correct.

16 Q. In this case no gun was ever recovered, no gun  
17 was ever submitted to you for any kind of  
18 testing?

19 A. That's correct.

20 Q. But that particular Exhibit Number 2 does tell  
21 you the kind of -- the caliber of weapon used  
22 in this case?

23 A. That's correct.

24 Q. Which is what you refer to as a 38, 357?

25 A. Yes.

1 Q. What's the difference between a 38 and a 357  
2 and why can't you tell us which one it is?

3 A. Well, what that refers to is the caliber of  
4 the gun. A revolver you can have it in 38  
5 special or 357 magnum. 357 magnum is slightly  
6 longer than a 38 special, so you could fire  
7 the 38 special in the 357 magnum, but not vice  
8 versa.

9 Also, the bullets are  
10 constructed, they're the same shape, size,  
11 weight, so it fires the same bullet, just a  
12 different casing on the back of it, so one is  
13 more powerful than the other.

14 Q. When you talk about a 38, 357 it's clear that  
15 this can only be a revolver?

16 A. That's correct.

17 Q. As opposed to say a semiautomatic handgun?

18 A. That's correct.

19 Q. We'll get to that in a little bit. This  
20 particular gun, for example, did it have  
21 anything unusual or strange about it? That  
22 particular exhibit I mean, and the gun that  
23 fired it?

24 A. No.

25 Q. When I go -- say that particular bullet, I buy



1           it at the gun store, what are the pieces of  
2           it? In other words, before it's fired and you  
3           end up with Exhibit Number 2 and some other  
4           pieces we'll talk about, what comprises that  
5           bullet?

6    A.    Okay. That bullet in -- a jacketed bullet in  
7           this case is usually a -- in this case is a  
8           copper jacket with a lead bullet core in the  
9           center of it. So it's actually two pieces to  
10          the bullet.

11   Q.    In other words, the part that takes off down  
12          the barrel of the gun towards the target has  
13          two pieces?

14   A.    That's correct.

15   Q.    The inside is lead, the outer part is copper?

16   A.    That's correct.

17   Q.    Why? Why isn't it all lead or copper?

18   A.    That's the way that bullet is constructed.

19   Q.    In this particular case the -- that jacket  
20          that was submitted to you had none of its core  
21          left to it, essentially; correct?

22   A.    That's correct.

23   Q.    What does that tell you?

24   A.    Just that the core did separate from the  
25          jacket at one time.

1 Q. When a bullet, again, that I buy from the  
2 store before it's fired, in addition to the  
3 jacket and the inside of that, the lead, is  
4 there more to it, in other words, casing,  
5 powder, primer, things like that?

6 A. That's correct. The entire unfired cartridge  
7 would have -- the bullet would sit on top and  
8 then will be the cartridge case, usually  
9 brass. Inside that brass casing contains the  
10 gun powder. And then there's a primer on the  
11 very back of the cartridge case, that's what  
12 the firing pin strikes to ignite the gun  
13 powder inside the shell casing.

14 Q. So again, as I pull the trigger, the firing  
15 thing hits that thing hard, that creates a  
16 small explosion in there; right?

17 A. That's correct.

18 Q. The powder and all that burn, and that's what  
19 forces that bullet down the barrel towards its  
20 target?

21 A. That's correct.

22 Q. Okay. What's left behind in the gun in a  
23 revolver is what you would refer to as a  
24 casing?

25 A. That's correct.

1 Q. I keep using the word bullet, would you agree  
2 with me a bullet to you means just the part  
3 that takes off down the barrel?

4 A. That's correct.

5 Q. What you call the whole thing that I buy from  
6 the store is what you call an unfired  
7 cartridge?

8 A. That's correct.

9 Q. Okay. And of that cartridge, the bullet takes  
10 off down the barrel, in a revolver what  
11 happens to the casing where -- where it was  
12 all -- the powder and all that was housed  
13 before it was fired?

14 A. When a revolver is fired, the -- the unfired  
15 cartridges are contained in what we call the  
16 cylinder on it. Then as you fire the gun,  
17 those cartridge cases stay behind in the  
18 cylinder until they're manually retrieved from  
19 the gun.

20 Q. I always -- back -- the western movies which  
21 you always see John Wayne and those guys  
22 firing those guns, then they have to stop at  
23 one point, kind of knock that little wheel  
24 out, get those things that they knock on the  
25 ground, those are casings; right?

1 A. That's correct.

2 Q. Then they have to take a bullet and load in  
3 each individual one back in that wheel, pop it  
4 back into place and then they can start  
5 shooting again?

6 A. That's correct.

7 Q. Are there any difference between those  
8 revolvers we see in the movies and the modern  
9 ones, other than maybe they're a little  
10 sleeker or something?

11 A. The function is the same.

12 Q. Now, contrast that if you would to what  
13 happens in a bullet when I half-fire it in a  
14 semiautomatic handgun?

15 A. Okay. In a semiautomatic handgun the unfired  
16 cartridge are contained in the magazine, which  
17 is usually in the grip of the gun. As the gun  
18 is fired, the unfired cartridges go into the  
19 barrel, the gun is fired, the slide comes back  
20 on the top and the fired cartridge case is  
21 thrown out of the gun, usually up to the right  
22 and to the rear. The slide then goes forward,  
23 chambering the next unfired cartridge ready to  
24 be fired.

25 Q. So however many bullets you have in that

1 magazine when you pop into, what you say is  
2 usually the handle of the gun, you can pull  
3 that trigger 17 times, 20 times, however many  
4 bullets and it will just keep firing?

5 A. It will fire as long as there is ammunition in  
6 the magazine.

7 Q. But it's one trigger pull for each bullet?

8 A. That's correct.

9 Q. In this particular case we're not talking  
10 about semiautomatic handguns; right?

11 A. That's correct.

12 Q. We're talking about the kind that would have a  
13 little wheel on it that would turn, in other  
14 words, with each pull of the trigger on this  
15 particular gun, the bullet takes off, the  
16 wheel turns, you pull it again, the bullet  
17 goes, the wheel turns, et cetera, et cetera?

18 A. That's correct.

19 Q. Okay. When we talk about a 38, 357, for  
20 example, again, going back to those old  
21 westerns, you see when John Wayne points it,  
22 you see just that little kind of barrel going  
23 off it?

24 A. That's correct.

25 Q. And with semiautomatics a lot of times the

1 barrel actually looks a little bit thicker,  
2 sort of, I'm holding my hands maybe an inch,  
3 inch and a half apart?

4 A. Correct.

5 Q. Are there any revolvers now that have that  
6 inch, inch and half part sticking out from it?

7 A. Yeah, there's some revolvers are manufactured  
8 of what we call an under lug. It's basically  
9 a counterweight underneath the barrel to make  
10 the pistol heavier.

11 Q. But again, it would still have that little  
12 wheel?

13 A. That's correct.

14 Q. But as you look at the barrel part it looks  
15 more like a semiautomatic than say the old  
16 kind of what I call the revolvers from the  
17 westerns?

18 A. It could.

19 Q. It could?

20 A. Right.

21 Q. Okay. I'm going to show you some more  
22 exhibits here which have been marked as 3, 4  
23 and 5, which are those. I'd like you to take  
24 a look at them. And 23.

25 You ready?

1 A. Yep.

2 Q. Okay. What are 3, 4 and 5, and what are --

3 what is 23?

4 A. They're all lead fragments.

5 Q. And when you get those lead fragments, 3, 4

6 and 5, you know now, I believe, or knew at the

7 time those were recovered from the scene of

8 this homicide; right?

9 A. That's correct.

10 Q. And 23 are lead pieces taken from the victim

11 during autopsy; right?

12 A. That's correct.

13 Q. What can you tell the jury about those

14 fragments?

15 A. The lead fragments are consistent with bullet

16 core material, that being the center portion

17 of the bullet.

18 Q. Are those lead fragments that you have in your

19 hands, 3, 4, 5 and 23, did they come from a

20 38, 357?

21 A. That I can't say for sure.

22 Q. Could they have come from something else?

23 Some other gun I mean.

24 A. They're consistent with being lead bullet

25 fragments.

1 Q. Well, just -- and I know we're not talking  
2 about a nine millimeter in terms of that  
3 jacket, but if I fired say a nine millimeter  
4 bullet out of a handgun, would it have that  
5 same lead core material that's there in 3, 4,  
6 5 and 23?

7 A. That's correct.

8 Q. Okay. But in this particular case if -- and  
9 I'm not saying a nine millimeter, but assuming  
10 for a minute that a nine millimeter had been  
11 fired in this case, and the casing was picked  
12 up and the gun was taken away and all you had  
13 was those lead fragments, you couldn't say  
14 whether it was a nine millimeter or a 45 or a  
15 38, 357 you just say, I got some lead  
16 fragments?

17 A. That's correct.

18 Q. Now, you -- what you do, firearm and tool mark  
19 examiners, a lot of time in movies and on TV  
20 they talk about ballistics?

21 A. That's correct.

22 Q. How do you distinguish ballistics from what  
23 you do?

24 A. Ballistics is the study of firearms and  
25 ammunition, what we call internal ballistics



1           would be the behavior as the gun is fired,  
2           external ballistics, which would be the study  
3           of the bullet as it's in flight between the  
4           barrel and the target, and terminal ballistics  
5           being the effects of the bullet on a target.

6   Q.   Do you have anything to do with ballistics?

7   A.   We dabble in it, but what I do is a  
8           comparative science.

9   Q.   When you say dabble in it, in other words, you  
10          fire a lot of guns for test patterns of  
11          casings and you're noting what happens as the  
12          bullet travels through the air and those  
13          things, but you're not an expert in it?

14  A.   That's correct.

15  Q.   Are all of the opinions that you've given here  
16          today to a reasonable degree of scientific  
17          certainty?

18  A.   Yes.

19  Q.   Is there anything else about Exhibit 2, 3, 4,  
20          5 or 23 that you can tell this jury about the  
21          weapon used in this case?

22  A.   The bullet fragments, no.

23  Q.   What about -- other than knowing it's a 38 or  
24          a 357, is there anything else that that  
25          jacketing tells you?

1 A. Just that it was probably fired out of a  
2 revolver manufactured by Smith & Wesson,  
3 Taurus or Sturm Ruger.  
4 Q. And do you know, for example, were you able to  
5 tell when that jacket had been fired?  
6 A. No.  
7 Q. Could have been fired ten years ago?  
8 A. Yes.  
9 ATTORNEY GRIFFIN: Nothing  
10 further.  
11 THE COURT: Cross.  
12 CROSS EXAMINATION:  
13 BY ATTORNEY CHERNIN:  
14 Q. To your knowledge, was that exhibit -- the  
15 jacket, I'm sorry, what number is that one?  
16 A. Exhibit 2.  
17 Q. 2. Was that submitted for any sort of organic  
18 testing to see if there were any DNA or any  
19 sort of biological materials on that?  
20 A. No.  
21 Q. It was not?  
22 A. That's correct.  
23 Q. And so we don't know if that gun passed  
24 through the dead person in this case; is that  
25 correct?

1 A. That's correct.

2 Q. And that was -- and to your knowledge that  
3 jacket has never been outside of the presence  
4 of law enforcement involved in this case;  
5 isn't that correct?

6 A. That's correct.

7 ATTORNEY GRIFFIN: Are we talking  
8 about since January 31st of '04?

9 ATTORNEY CHERNIN: Yes.

10 BY ATTORNEY CHERNIN:

11 Q. Since January 31st of '04 that's always  
12 consistently been in the possession of law  
13 enforcement involved with this case; correct?

14 A. That's correct.

15 Q. And you know that because of then inventory  
16 number on it and the markings; is that  
17 correct?

18 A. That's correct.

19 Q. And that those inventory numbers and markings  
20 would be found on Exhibit 2 and they're  
21 consistent with -- there's a -- an inventory  
22 number indicating that Detective Tom Casper  
23 got that -- picked up that jacket and then got  
24 it to you at the crime lab; correct?

25 A. That's correct.

1 Q. And other than the time that that left your  
2 possession at the crime lab, was returned to  
3 Detective Casper or somebody else with  
4 Milwaukee Police Department?

5 A. That's correct.

6 Q. Now, you talked about an under lug on a  
7 barrel?

8 A. Yes.

9 Q. Is that manufactured by the manufacturer or is  
10 that under lug an after market piece?

11 A. It's usually a factory item.

12 Q. And to your knowledge, does Sturm Ruger make  
13 such a weapon with an under lug?

14 A. Yes.

15 Q. And also Taurus?

16 A. Yes.

17 Q. And also Smith & Wesson?

18 A. Yes.

19 Q. But there is no question that a revolver is  
20 still going to have that cylinder protruding  
21 from it; correct?

22 A. That's correct.

23 Q. And does Smith & Wesson make a silver gun with  
24 black grips in the revolver?

25 A. Yes.

1 Q. And similarly, for Taurus and Sturm Ruger?

2 A. That's correct.

3 Q. Now, you do not know whether this was fired

4 out of a 38 or a 357, the -- the casing,

5 Exhibit Number 2 -- or jacket rather, Number

6 2, you don't know whether that was fired from

7 a 38 or a 357?

8 A. It could have been either.

9 Q. And a 38 refers to the length of the barrel;

10 is that correct?

11 A. Well, 38 is just a name, but you're talking

12 about the length of the cartridge case, would

13 be the name for that.

14 Q. Okay. Now, how long is the barrel on a 38?

15 A. Whatever barrel length the factory produced it

16 in.

17 Q. What does -- what lengths does Sturm Ruger?

18 A. Anywhere from two inches to seven and a half.

19 Q. And would that also be the case with Taurus?

20 A. Yes.

21 Q. And with Smith & Wesson?

22 A. Yes.

23 Q. And you can't say what length of barrel was

24 used to shoot casing number -- or jacket

25 Number 2; can you?

1 A. That's correct.

2 Q. Your initial test of the lead fragments or  
3 some of the lead fragments was from February  
4 of 2004; correct?

5 A. That's correct.

6 Q. Exhibit 33, that testing was done in February  
7 of 2004; correct?

8 A. That's correct.

9 Q. And then Exhibit 34, the bullet fragments from  
10 the autopsy report -- or from the body, that  
11 testing you did February 15th of 2005? Two  
12 days ago?

13 A. That's correct.

14 Q. Why did it take you a year to test those --  
15 the fragments from the autopsy?

16 A. I never received this item until this week.

17 Q. And do you know when you did receive that?

18 A. Well, I worked it on the 9th, which would have  
19 been Tuesday.

20 Q. Tuesday?

21 A. Excuse me, the 15th.

22 Q. So you received it the 15th and you worked on  
23 it on the 15th?

24 A. That's correct.

25 Q. And if you had had additional time to work on

1           that, would there have been any other tests  
2           that you could have performed to determine  
3           whether the bullet fragments -- yeah, the  
4           bullet fragments came from the same gun as the  
5           jacket?

6    A.    No.

7    Q.    Lead is just lead; is that correct?

8    A.    Lead is lead, that's correct.

9                               (Defense counsel confers with  
10       defendant.)

11   BY ATTORNEY CHERNIN:

12   Q.    Did you receive the jacket, the copper jacket,  
13       did you receive the copper jacket on -- in  
14       Exhibit Number 2, did you -- do you get an  
15       inventory report from the Milwaukee Police  
16       Department accompanying that?

17   A.    No.

18                           ATTORNEY CHERNIN:   I have no  
19       additional questions of this witness.

20                           THE COURT:   Redirect.

21                           ATTORNEY GRIFFIN:   Could I see  
22       you on the side for just a second, Judge.

23                           (Side bar.)

24                           THE COURT:   Nothing further of  
25       this witness from either side; is that

1 correct, gentlemen?

2 ATTORNEY GRIFFIN: Correct.

3 ATTORNEY CHERNIN: That is  
4 correct, Your Honor.

5 THE COURT: Mr. Simonson, you may  
6 step down.

7 (Witness excused.)

8 THE COURT: All right. Ladies  
9 and gentlemen of the jury, we're going to end  
10 our morning session at this time and we're  
11 going to pick back up at 1:15 this afternoon.  
12 That will give you a good hour and 15  
13 minutes. And one of the things I'm going to  
14 advise you of is a ruling that I have made  
15 earlier this morning with both counsel, and  
16 they are aware of it, and that is going  
17 forward you will be kept together, sequestered  
18 together, both coming and leaving the  
19 courtroom. You will also be kept together and  
20 will eat together for lunch, and that has been  
21 brought up and will be served in the jury  
22 room.

23 All your bathroom breaks will be  
24 taken in the jury room. And I understand that  
25 there are a couple of smokers. We have



1       decided to crack the window a bit. Is there  
2       anyone who's going to object to that?  
3       Otherwise we can -- and don't feel, you know,  
4       embarrassed about it, I don't smoke so, you  
5       know, if you -- if you'd rather have those  
6       people who are -- who are my smokers in the  
7       group? How many do I have that actually --  
8       okay, we got three. Three of you. I thought  
9       it was more than that. There's three. All  
10      right.

11                   What we will do, if that becomes  
12      a problem for anybody else who's in the jury  
13      room, what we will do is one of my deputies  
14      will stay back with those three, take them out  
15      at the time that they need to have a cigarette  
16      break, it's usually before the lunch is  
17      served. We can do it afterwards if you want  
18      to wait. You can coordinate that through my  
19      deputy. But the rest of you will remain back  
20      together in the jury room, you will not be  
21      allowed to wander out, sort of individually,  
22      for lunch from now on or coming or going.

23                   At the end of the day today I'm  
24      going to make some announcements about where  
25      you will congregate in the morning and the

1       deputies coming to get you and how you will  
2       leave in the morning and how my deputies will  
3       escort you out. Those are the kinds of things  
4       I have made a decision about. It's nothing  
5       for you to be concerned about in the sense of,  
6       you know, anybody done anything wrong, it's  
7       just that as I indicated to you earlier, I  
8       want to avoid even the appearance of somebody  
9       suggesting that the jury was somehow tainted,  
10      talking or overhearing conversations in the  
11      hallway, talking to people. And so even to  
12      just avoid that possibility, this is the best  
13      way to address that situation. So I'm going  
14      to ask you to cooperate. If you have any  
15      questions about that, what you're allowed to  
16      do or not do in that regard, please direct it  
17      to my deputies and they'll communicate  
18      anybody's concerns directly to me.

19                       So at this point you're going to  
20      be discharged into the back into the jury  
21      room, and in addition, if anyone wants to go  
22      out and stretch their legs, the deputies will  
23      take you, again, together, you know, not  
24      individually, together, for those of you who  
25      want to go out and stretch your legs, get some

1 fresh air. In the summertime we routinely do  
2 that, not so much in the wintertime. If  
3 that's something you want to do as well.  
4 Again, it has to be done collectively and with  
5 my deputies. Thank you.

6 DEPUTY: All rise for the jury  
7 please.

8 (Jury out of box.)

9 THE COURT: Please be seated.  
10 The court wants to make a brief record of  
11 the -- a brief record of the basis for the  
12 court making the ruling that I have made with  
13 respect to the jury and the sequestration  
14 order requiring them to remain together for  
15 lunches, when they come and when they depart  
16 in the evening. And it's based on the  
17 following factors. This court has the primary  
18 duty of not only insuring the defendant has a  
19 fair trial, but I have an equal duty to make  
20 sure that the fair trial is done in a safe  
21 fashion. And in that regard, specific issues  
22 have arisen over the course, primarily of the  
23 last day, for certain over the last 48 hours,  
24 with respect to additional security measures  
25 being taken.

1                   I was advised, and I then with my  
2       deputies advised the lawyers, that there were  
3       several things that came to my attention  
4       yesterday, some directly to my attention and  
5       some indirectly. The things that came to my  
6       attention directly I think I've already spoken  
7       about in an earlier session yesterday with the  
8       defendant, and that is the defendant's  
9       behavior, which was primarily directed at the  
10      court, that is me, at the end of the morning  
11      session yesterday, Wednesday, February 16th.  
12      And it had to do with the court's ruling on a  
13      particular matter.

14                   The defendant wanted to --  
15      outside the presence of the jury, admonish the  
16      court for not ruling in any way since the  
17      beginning of the trial in the defense's  
18      favor. In addition, the defendant, in what I  
19      took to be an aggressive posture towards the  
20      court, indicated that I don't, that is the  
21      court, does not intimidate him. And finally,  
22      that the defendant is not going down for this,  
23      I believe these are fairly accurate quotes.  
24      And then finally, what are you going to do  
25      about it, hold me in contempt.

1                   My response at the time was I  
2           think fairly measured. It is clear to the  
3           court and I think clear to anyone who observed  
4           that outburst yesterday, that it was a clear  
5           basis for this court to in fact find the  
6           defendant in contempt. The court decided that  
7           that was an extreme measure that in my  
8           judgment wasn't necessary, at least from my  
9           perspective, in terms of the way he had  
10          addressed the court, and that I would at least  
11          admonish him and as well talk to his lawyer  
12          about making sure that he understood what the  
13          restraints were, the constraints I should say,  
14          about his behavior in the court, both in front  
15          of the jury and outside the presence of the  
16          jury.

17                   That took care of the issue with  
18          respect to the defendant's behavior towards --  
19          directly towards the court. But I have, as I  
20          said earlier, an obligation to make sure that  
21          any proceeding in here is done in a safe  
22          fashion. So in that regard, mindful of my  
23          obligation to the jury, to my staff and to any  
24          individuals who are in the gallery during this  
25          trial, in conjunction with the advice and

1 direction of my deputies, we decided to take  
2 the following steps.

3 First, it was decided that we  
4 would add additional security to the  
5 courtroom. That was accomplished yesterday  
6 afternoon with two additional deputies inside  
7 the courtroom and at least one outside the  
8 courtroom in the gallery for the better part  
9 of the afternoon session. That would continue  
10 as I had worked it out with my deputies for  
11 the duration of the trial.

12 Secondly, the court indicated  
13 that the -- I consented to the deputy's  
14 directive that they should use the stun belt  
15 for the defendant, who I was advised after he  
16 departed my court was continued to be highly  
17 agitated, not only at them but at anyone back  
18 in the bullpen area, as well as his own lawyer  
19 for the better part of the lunch hour  
20 yesterday. In addition, my deputies advised  
21 me as to the reasons for the stun belt, that  
22 the defendant had made certain statements to  
23 them back there during the lunch hour, as well  
24 as earlier in the day, he was not going down  
25 for this, you might as well use your gun and

1           kill me now.

2                               Finally, there was some  
3           statements made by the defendant as it relates  
4           to his coming and going from the courtroom.  
5           That is, when he had been brought up yesterday  
6           by my deputy from the jail to the court, he  
7           was asking questions directly related to the  
8           path that he would be taking every day in the  
9           morning, what floor he'd be coming and leaving  
10          from, what time he does that, whether there  
11          are any other individuals who are allowed, is  
12          it a public entrance, a private entrance, are  
13          people allowed to have access -- other people  
14          allowed to have access to this same pathway.

15                           Those are the types of questions  
16          that good law enforcement take heed of and  
17          analyze to determine whether or not the  
18          defendant or anyone in custody is considering  
19          abusing his in-custody status. That's  
20          longhand for saying whether or not he's  
21          interested in fleeing or having an attempt to  
22          flee or have others assist him in fleeing.  
23          Based upon those comments, the court, in  
24          addition to my own observation of the  
25          defendant, agreed with the Sheriff's

1 Department that they should take the  
2 additional step of securing the defendant with  
3 a stun belt for the duration of the trial.  
4 That has also been accomplished.

5 The third thing that I indicated  
6 to the Sheriff's Department was that I wanted  
7 the defendant to continue to have the use of  
8 his hands, but he must be fully restrained,  
9 continue to be fully restrained at his ankle  
10 to the eye bolt directly under the floor. As  
11 indicated in my ruling earlier, both tables,  
12 defense and the State, have skirted tables,  
13 thus blocking the jury's direct line of vision  
14 to the defendant, and the security measures  
15 that are ostensibly out of their view, that is  
16 around his ankle and under the table, secured  
17 to an eye bolt.

18 Finally, I indicated to the  
19 deputies that if it should become necessary,  
20 should the defendant engage in any further  
21 disturbances, either out of my presence or  
22 directly in my presence, we may in fact be  
23 forced to take the following two measures.  
24 Number one, we will secure his hands, but  
25 direct him to keep his hands below the table



1       for the duration of the trial. If that was  
2       unsuccessful, then the court would take the  
3       most drastic step, which would be to secure  
4       the defendant outside the presence of the jury  
5       for the remainder of the trial. He would  
6       still have access either through a video  
7       conferencing directly from the jail, or in  
8       Judge John Franke's courtroom, which has a  
9       glassed-in area that is for that specific  
10      purpose, to have defendants who have become  
11      disruptive or unruly in front of a jury, to  
12      separate them from the defense table and to  
13      actually have them in a separate area of the  
14      courtroom.

15                   Fortunately, after the lunch hour  
16      yesterday when I explained certain things to  
17      the defendant, he indicated to the court that  
18      he was all right, that he was going to be  
19      compliant with all further directives, even  
20      though he may not agree with them, and that it  
21      would not be a necessity to take those  
22      additional steps. Today, Thursday we have had  
23      no problems with the defendant at all. So  
24      again, since noon yesterday we have not found  
25      it necessary to engage in any additional

1 security measures.

2                   However, at least in terms of the  
3 defendant directly, it also came to my  
4 attention however that there were individuals,  
5 as I mentioned in a -- a brief comment  
6 yesterday towards the end of the day, and  
7 whether they are one and the same we do not  
8 know, but there are three male individuals,  
9 they appear to be African-American, who had  
10 approached my clerk, a member of my staff, and  
11 made some comments to her outside this court,  
12 which again is inappropriate. The specifics  
13 of the comments had to do with whether or not  
14 she was going to be getting her fingers  
15 ready. Fingers ready for what we could only  
16 speculate and so we don't know what that  
17 means. The court looks at it, as I think a  
18 prudent court does, as an ill-advised comment  
19 at best, and -- and a possible threat at  
20 worse.

21                   In addition, the three  
22 individuals, again of African-American  
23 heritage, young males, entered the courtroom  
24 yesterday afternoon, I had not seen them prior  
25 to that time. They had been in the gallery.

1 I had asked both counsel whether or not they  
2 recognized them or whether they were  
3 witnesses. Neither one indicated that they  
4 were familiar with them. I asked my deputy to  
5 make sure that he watched them throughout the  
6 rest the trial. One of the things -- actually  
7 two things became clear to the court. Certain  
8 individuals were found at the end of this  
9 hallway down in the direction, I believe, of  
10 Judge Conen's court, although I could be  
11 mistaken on that.

12 In any event, they were out in  
13 the hallway at the same time witnesses in this  
14 trial were under a sequestration order from  
15 the court. Those individuals had come in and  
16 out of the court on at least one or two  
17 opportunities yesterday afternoon, and I was  
18 advised, again by one of my deputies, that on  
19 one occasion a few of them were in the direct  
20 vicinity, if not immediately next to,  
21 witnesses that had been scheduled or were  
22 scheduled to testify in this case.

23 When I combined all of those  
24 types of observations and comments, in light  
25 of the defendant's behavior in my court, it

1       became clear to me that additional steps  
2       needed to be taken to protect the sanctity of  
3       the jury and of witnesses. And indeed I  
4       advised my -- both lawyers and my deputy that  
5       we needed to remind Antonia West, a witness  
6       who had already testified in this case but had  
7       not been released from her subpoena, that she  
8       was to remain outside the courtroom and not  
9       discuss her testimony with anyone until  
10      directed to do so by this court. And yet, we  
11      found her in the back row of the gallery  
12      during the initial stages of Mr. Jennings'  
13      testimony yesterday afternoon.

14                   With that as a backdrop, the  
15      court believed that the most prudent steps to  
16      be taken to secure, as I said, the sanctity of  
17      the jury from any direct or indirect contact  
18      or interaction with potential witnesses or  
19      other people connected to this case, that the  
20      State's request that I sequester them for the  
21      duration of the trial be granted. My  
22      ruling -- I believe the defense had asked that  
23      I not make such a broad statement.

24                   I don't think that the State  
25      wanted me to initially announce the

1       sequestration order in court, and the defense  
2       had asked that I somehow communicate my  
3       desires or my directives through my deputies.  
4       I advised both of them that I was denying  
5       those requests. Everything we do in here has  
6       to be on the record. That's for appellate  
7       purposes, and so that is why I advised -- why  
8       I'm making the record the way I am right now,  
9       and I advised the parties that I would be  
10      addressing the jurors myself.

11               Finally, Mr. Chernin's request  
12      that I allow the deputy to sort of communicate  
13      that to them, to the jurors about coming and  
14      going and taking smoking breaks and so forth,  
15      that that come from my deputy, and again, I  
16      denied that request. It is not a sheriff's  
17      directive, it's a court order, and it must  
18      come from the court.

19               The directive is as follows. As  
20      I have indicated to the jurors today before  
21      they broke, that they will, for the duration  
22      of the trial, be kept together. When they're  
23      coming in the morning they'll report down to  
24      Jury Management to a particular area. We will  
25      work the logistics of that out. Then they

1 will be escorted up here together as a group  
2 with my deputies to the jury room. At the end  
3 of the day the procedure will be followed  
4 again.

5 With respect to lunch, they will  
6 be kept together as if they were in  
7 deliberations. They will be kept together for  
8 lunch. Lunch will be served up in the jury  
9 room and there will be a deputy back there at  
10 all times. I believe that those -- we will  
11 release them for the evening. The  
12 sequestration order does not require that it  
13 carry into the evening in their homes. They  
14 will return to their homes in the evening.

15 I believe that those are the  
16 appropriate steps that needed to be taken in  
17 this court's belief that it would protect the  
18 sanctity of the jury's purview and of their --  
19 their ultimate deliberations.

20 Mr. Griffin, is that a fairly  
21 accurate summary of the discussions we had  
22 about this subject earlier this morning?

23 ATTORNEY GRIFFIN: Yes.

24 THE COURT: Mr. Chernin?

25 ATTORNEY CHERNIN: Yes, Your

1 Honor. Your Honor, something occurred to me  
2 as you were speaking. One of the things that  
3 the court might want to add is back in prior  
4 times when they did used to sequester juries  
5 there was an additional instruction that  
6 despite the fact that they were together that  
7 they should not commence to discuss the case  
8 or commence deliberations. And since you've  
9 already instructed them that, but now because  
10 of their being together all the time, at least  
11 while they're together, if you could give them  
12 some form of instruction in that regard that  
13 they're not to discuss the case or commence  
14 deliberations, I would appreciate that.

15 THE COURT: I will agree to do  
16 that.

17 ATTORNEY CHERNIN: Thank you.

18 Beyond that, there is one other  
19 matter with respect to Exhibit 32, the autopsy  
20 protocol. There was a toxicology report that  
21 was attached as a last page on the portion  
22 that was presented to Doctor Jentzen. I  
23 believe that Mr. Griffin did that  
24 inadvertently and Doctor Jentzen did not  
25 testify as to matters contained within the

1 toxicology report. And Mr. Griffin and I  
2 agree that the toxicology report is not a  
3 proper item of -- for that exhibit and we're  
4 asking that that be removed.

5 THE COURT: Mr. Griffin?

6 ATTORNEY GRIFFIN: I think I  
7 already did, but I'll double check. In any  
8 event, 32 will not include, when it goes into  
9 the record -- and we can talk about exhibits  
10 in a minute -- yes, I already removed it.

11 ATTORNEY CHERNIN: Lastly, Your  
12 Honor, Mr. Wilber, I asked him about those  
13 three individuals, he doesn't have any idea  
14 who they are and he says that they're not  
15 people that he knows to his recollection and  
16 he did not know who they are. And so not that  
17 I'm arguing with the court, we're just letting  
18 the court know that so that the court can do  
19 what it wants to do.

20 THE COURT: We still have the  
21 issue to deal with of the demonstrative  
22 evidence. I'm going to take that up between  
23 1:15 and 1:30. That gives you folks an hour  
24 for your lunch hour and it gives my staff a  
25 break as well. They've been at this since



1           7:30 this morning.

2                       That's it, gentlemen.

3                       (Lunch break taken.)

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1 STATE OF WISCONSIN )

2

3 MILWAUKEE COUNTY )

4

5 I, Lori J. Cunico, do hereby certify  
6 that I am a Registered Professional Reporter,  
7 that as such I recorded the foregoing  
8 proceedings, later transcribed by me, and that  
9 it is true and correct to the best of my  
10 abilities.

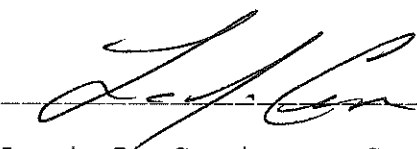
11

12 Dated this 11<sup>th</sup> day of October, 2005, at  
13 Milwaukee, Wisconsin.

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17   
Lori J. Cunico - Court Reporter

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